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In the

Supreme Court of the United States

ALABAMA-TOMBIGBEE RIVERS COALITION, an Alabama nonprofit corporation, PARKER TOWING COMPANY, INC., an Alabama corporation, CHARLES A. HAUN, an individual,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of the Interior, SAM HAMILTON, Regional Director of the United States Fish and Wildlife Service, U.S. FISH AND WILDLIFE SERVICE, an agency of the United States Department of the Interior, STEVE WILLIAMS, Director of Fish and Wildlife Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the federal government exceed its power to regulate commerce among the states by regulating under the Endangered Species Act a fish—the Alabama sturgeon—that is found only in one state and is not used for any commercial purpose?

PARTIES TO THE PROCEEDINGS

Petitioners are the Alabama-Tombigbee Rivers Coalition, an Alabama nonprofit corporation; Parker Towing Company, Inc., an Alabama corporation; and Charles A. Haun, an individual. Respondents are Dirk Kempthorne, Secretary of the United States Department of Interior; Sam Hamilton, Regional Director of the United States Fish and Wildlife Service; United States Department of the Interior; United States Fish and Wildlife Service, an agency of the United States Department of the Interior; and Steve Williams, Director of the United States Fish and Wildlife Service.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners Alabama-Tombigbee Rivers Coalition, and Parker Towing Company, Incorporated, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

The Alabama-Tombigbee Rivers Coalition, Parker Towing Company, Inc., and Charles A. Haun, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 477 F.3d 1250 (11th Cir. 2007), and is included in Appendix (App.) A. The Opinion of the District Court is unpublished and is included in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 8, 2007. That court's denial of the Petition for Rehearing *En Banc* was entered on May 3, 2007. App. E. This Court granted an extension of time in which to file this Petition to and including September 14, 2007, on July 17, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The pertinent provision of the United State Constitution provides that Congress has power "to regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The pertinent provisions of the Endangered Species Act are set out at Appendix F.

STATEMENT OF THE CASE

A. Factual Background

1. Regulatory Framework

The Endangered Species Act directs the Secretary of the Interior, through the United States Fish and Wildlife Service, to "list" any species the Secretary determines is endangered or threatened. 16 U.S.C. § 1533(a), App. F1. That determination must be made solely on the "best scientific and commercial data available" after taking into consideration: (1) "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range"; (2) overutilization for commercial, recreational, scientific, or educational purposes"; (3) "disease or predation"; (4) "the inadequacy of existing regulatory mechanisms"; or (5) "other natural or manmade factors affecting [the species'] continued existence." 16 U.S.C. § 1533(a)(1), App. F1.

When a species is listed as endangered or threatened, a species is automatically afforded various protections under the Act. Some of these protections impose duties on federal agencies while others restrict or compel private conduct. Under Section 7 of the Act, federal agencies are required to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2), App. F5. An agency "action" includes the granting of discretionary permits and licenses. 50 C.F.R. § 402.03.

Therefore, if an agency determines its proposed action may adversely affect a listed species or its critical habitat, the agency must consult with the Fish and Wildlife Service.

16 U.S.C. § 1536(a)(2), App. F5. Consultation may also occur "at the request of, and in cooperation with," a prospective permit or license applicant "if the applicant has reason to believe" that a listed species "may be present in the area affected by his project and that implementation of such action will likely affect such species." *Id.* at § 1536(a)(3). App. F5-F6. Following consultation, the Fish and Wildlife Service will issue an opinion explaining how the proposed action will affect the species or its habitat, and suggest alternatives to avoid jeopardizing the species or adversely modifying its habitat. *Id.* at § 1536(b)(3)(A), App. F7. An "incidental take statement" authorizing the project must be issued if the proposed alternatives will minimize harm to the species. *Id.* § 1536(b)(4), App. F8. The proposed alternatives will generally become conditions of the permit or license.

Section 9 of the Endangered Species Act makes it unlawful for any person (or entity) to "take" a listed species without a federal permit. *Id.* at § 1538(a)(1)(B), App. F9. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). These limitations, as well as other provisions of the Act, apply to nonfederal actors such as Petitioners without regard to whether the regulated species has a connection with or effect on interstate commerce. Section 11 of the Endangered Species Act provides for both civil and criminal penalties for violations of the Act. *See id.* at § 1540.

2. Procedural History

The Alabama sturgeon is a small freshwater fish found only in limited parts of the Alabama River in southern Alabama, downstream to the mouth of the Tombigbee River. 65 Fed. Reg. 26438 (May 5, 2000) (Final Rule). The sturgeon is protected by state law and its conservation has been enhanced by Petitioners' efforts. *Id.* at 26455-26456.

The U.S. Fish and Wildlife Service proposed listing the Alabama sturgeon as endangered in 1993. 58 Fed. Reg. 33148 (June 15, 1993). As a result, various businesses in the State of Alabama became concerned about the economic impact of the listing. App. C5-C6. The Petitioner Coalition was therefore formed to evaluate the Service's scientific and legal bases for listing the sturgeon. App. C6. This evaluation revealed that the agency had relied on a study provided by a scientific committee improperly convened. *Id*. The Coalition sued the agency and obtained an injunction preventing the agency from using the study. *See Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103 (11th Cir. 1994). In 1994, the Service withdrew the proposed rule citing "insufficient information to justify listing" the sturgeon. 59 Fed. Reg. 64794 (Dec. 15, 1994).

Before and after the withdrawal of the proposed listing, the Coalition was actively involved in various scientific studies and conservation efforts involving the sturgeon. App. C6. In 1996, the Coalition arranged discussions among the Service, the Army Corps of Engineers, the State of Alabama, and members of the State's congressional delegation that resulted in a Voluntary Conservation Plan that was led by the State and funded by Congress. *Id.* Ultimately, the Coalition was successful at bringing federal and state interests together to convert the Voluntary Conservation Plan into a formal Conservation Agreement to recover the sturgeon. *Id.* This Agreement involved a ten-year, $8 million conservation program. App. C6-C7.

In the midst of these efforts, the Service issued another Proposed Rule in 1999, to list the sturgeon as an endangered species. 64 Fed. Reg. 14676 (Mar. 26, 1999). The Final Rule listing the Alabama sturgeon as endangered was issued in 2000. 65 Fed. Reg. 26438 (May 5, 2000). As a consequence of the listing, the Coalition filed this suit under the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(1), and the judicial

review provision of the Administrative Procedure Act, 5 U.S.C. § 701-706. App. C7. The Coalition sought declaratory judgment and injunctive relief complaining the Final Rule was invalid because the Service: (1) followed an improper process; (2) incorrectly determined that the Alabama sturgeon is a separate species from the Mississippi shovelnose sturgeon; (3) failed to designate critical habitat concurrent with the listing; (4) gave improper notice; and, (5) the listing authority exceeded Congress' power to regula e commerce. *Id.*

On a cross-motion for summary judgment, the government argued the Petitioners lacked Article III standing. *Id.* Although the district court agreed, the Eleventh Circuit did not. On appeal, the circuit court found the listing of the Alabama sturgeon had injured, and would continue to injure, Coalition members because Coalition members "operate their businesses subject to federal licenses and permits" and the associated "activities take place in historical Alabama sturgeon habitat." App. C16. The court found the "listing adds another layer of concrete economic considerations" to the Coalition members' dealings and that each member averred they are "modifying their facilities, altering their operations, or expending resources" in response to the listing and that the ESA consultation requirement is causing them "injury in the form of planning, studies, and delays." *Id.* Thus, the court held the Coalition satisfied the "injury in fact" prong of Article III standing.

As to the traceability prong of Article III standing, the court was equally clear: "Here, the Coalition's injuries are produced by the coercive effect of the ESA as implemented by the FWS or NMFS: federal agencies *and* Coalition members must at least consider whether consultation is necessary for their activities." App. C19. This point was particularly evident, the court pointed out, "in light of the possibility of the Coalition's members running afoul of the 'take' prohibition if

they or acting agencies fail to consider the Alabama sturgeon at all with respect to their activities in its historical habitat." *Id.*

Finally, the circuit court determined the Coalition satisfied the third prong of Article III standing, redressability, "because delisting the sturgeon will eliminate the additional considerations of which the Coalition complains." App. C20. Having thus concluded that the Coalition had economic standing under the ESA and satisfied the requirements of Article III of the Constitution, the circuit court remanded the case to the district court for a determination on the merits of the case. The district court granted summary judgment in favor of the government on all claims. App. B. This was sustained by the Eleventh Circuit. App. A. Subsequently, the Coalition filed a petition for rehearing *en banc* on the Commerce Clause issue which was denied. App. E.

B. Substantive Proceedings

1. The District Court Decision

With respect to the Commerce Clause challenge to the listing of the Alabama sturgeon, the only issue presented in this petition, the district court acknowledged this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), limiting the commerce power to economic activity, but relied on the opinions of the lower courts interpreting those cases and upholding the Endangered Species Act against similar challenges. App. B8-B12. The district court also was persuaded that this Court's recent decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), authorized federal regulation of activities that "are solely intrastate and non-commercial" as part of a larger regulatory scheme. B12-B14. More specifically, the court held: "The listing of a purely intrastate, noncommercial species under the ESA does not violate the Commerce Clause because 'the 'incalculable' value of the genetic heritage that *might* be lost absent regulation' would undoubtedly harm interstate

commerce in a permanent and irreparable way." App. B14 (emphasis added).

2. The Eleventh Circuit Decision

The circuit court also dismissed the Commerce Clause challenge based on the premise that the ESA is a "larger regulation of economic activity" and, under *Raich*, the court has "'no power to excise, as trivial, individual instances of the class,'" like the regulation of purely intrastate and noncommercial species. App. A41.

In arriving at its conclusion that the ESA "is a general regulatory statute bearing a substantial relation to commerce," unlike the Gun-Free School Zones Act in *Lopez* and the Violence Against Women Act in *Morrison*, the court seized on a single provision in the ESA and observed that the Act prohibits all interstate and foreign commerce in endangered species and the "value of this genetic heritage is, quite literally, incalculable." App. A41-A42. To bolster this conclusion, the Eleventh Circuit cited a substantial market in endangered species and the potential scientific and economic values that could be lost if some species become extinct. App. A42-43.

The court even speculated that the Alabama sturgeon might sufficiently recover for commercial harvesting. App. A46. But, the court explained, the issue "does not turn on the present or potential commercial value of the Alabama sturgeon alone." App. A47. Even if the court "found a commercial nexus completely lacking here," it would not "excise individual applications" of what it characterized as "a concededly valid statutory scheme." *Id.*

In responding to the Coalition's argument that *Raich* and *Wickard v. Filburn*, 317 U.S. 111 (1942), are distinguishable from this case because the ESA is not like the Controlled Substances Act in *Raich* that covered the entire market in drugs, or the Agricultural Adjustment Act in *Wickard* that controlled the entire market in wheat, the circuit court stated it was "not

convinced that the principle that Congress may regulate some intrastate activity as an essential part of a larger permissible regulation is limited to the facts" in those cases. *Id.* Instead, the court concluded:

> This case, like *Raich*, also turns on whether Congress had a rational basis for believing that regulation of an intrastate activity was an essential part of a larger regulation of economic activity. Unlike the statute involved in *Raich*, Congress did not rely on commodity pricing in justifying the Endangered Species Act. Instead, it made a determination that the most effective way to safeguard the commercial benefits of biodiversity was to protect all endangered species, regardless of their geographic range.

App. A48-A49.

REASONS FOR GRANTING THE WRIT

I

Whether the Federal Government Exceeded Its Power to Regulate Commerce among the States by Regulating under the Endangered Species Act a Fish—the Alabama Sturgeon—That Is Found Only in One State and Not Used for Any Commercial Purpose Is an Important Question of Federal Law That Should Be Settled by This Court

This case raises a constitutional challenge to the listing of an intrastate, noncommercial species under the Endangered Species Act which this Court has described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley*

Authority v. Hill, 437 U.S. 153, 180 (1978). Indeed, the ESA is pervasive and requires the protection of listed species, like the Alabama sturgeon, "whatever the cost." *Id.* at 184. The sturgeon is a rare, noncommercial species found only in the State of Alabama. Any person who harms an endangered fish, such as the sturgeon, including adverse habitat modification, without federal authorization, may be subject to heavy civil fines ($25,000 per violation) or severe criminal penalties, including imprisonment. *See* 16 U.S.C. § 1540(a) and (b). According to the Fish and Wildlife Service, approximately half of all species listed as threatened or endangered in the United States have habitat on private land. *See Our Endangered Species Program And How it Works With Landowners*, http://fws.gov/endangered/factsheets/landowners.pdf (Last visited September 7, 2007). Therefore, the constitutional question presented in this case is sure to be repeated.

This is not the first time this Court has been petitioned to decide if the Endangered Species Act, as interpreted by the lower courts, goes too far. But this Court has not yet addressed the question. This Court has denied certiorari in four other cases raising the same important federal question presented here. *See National Association of Home Builders v. Babbitt*, 130 F.3d 1041(D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998) (whether regulation of a local fly under the ESA exceeds the commerce power); *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001), *cert. denied* 534 U.S. 1108 (2002) (whether regulation of local fairy shrimp under the ESA exceeds the commerce power); *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1218 (2004) (whether regulation of local toad under the ESA exceeds the commerce power); and, *GDF Realty Investments Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004), *cert. denied* 545 U.S. 1114 (2005) (whether regulation of local cave species exceeds the commerce power).

As this Court has observed, the environment is "a matter in which it is common to think all persons have an interest." *Bennett v. Spear*, 520 U.S. 154, 165 (1997). Likewise, everyone has an interest in the "rule of law." But as this case demonstrates, the lower federal courts have traded our most fundamental constitutional safeguards for *federal* regulation of local species that have been the traditional province of the States.

Those safeguards require a federal government of limited powers. *See* U.S. Const. Art. I, § 8. The Framers understood this:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.

The Federalist No. 45 at 292-293 (James Madison) (C. Rossitor ed. 1961).

This Court has expressly acknowledged that this division of power is necessary to protect our fundamental liberties:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

But if Congress can pass laws under the commerce power regulating any activity that affects protected species, as the court held it could in this case, there is no human endeavor beyond federal control: "[D]epending on the level of generality, any activity can be looked upon as commercial." *United States v. Lopez*, 514 U.S. at 565.

As the Fifth Circuit has observed:

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic activity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, thereby turning that clause into what it most certainly is not, a general police power.

United States v. Ho, 311 F.3d 589, 599 (5th Cir. 2002).

When the federal government lists a species, like the Alabama sturgeon in this case, it assumes functional control over the species' habitat. If the listing authority is not directed at regulating interstate commerce, it would result in a significant impingement on the states' traditional and primary power over land and water use. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173-174 (2001). *See also GDF Realty*, 362 F.3d at 292 (Jones, J.) (dissenting from the denial of rehearing *en banc*.)

When this Court determined in *Tennessee Valley Authority v. Hill, supra,* that enforcement of the ESA must occur "whatever the cost," it set up an inevitable constitutional conflict. The Fish and Wildlife Service reports that over 1,300 species of plants and animals are currently listed across the nation. *See* http://ecos.fws.gov/tess_public/boxscore.do (Last visited on September 7, 2007). As evidenced by this case, and others like it, federal officials assert plenary authority over land and water resources all across the country where listed species exist.

Some legal scholars have noted the need for this court to address the scope of the commerce power under the ESA. In his article, *The Commerce Clause Appropriately Defined Within a Universe Without Distinction: The Federal Endangered Species Act's Unconstitutional Application to Intrastate Species*, 25 T. Jefferson L. Rev. 649 (2003), Justin G. Reden, the author considers whether the application of the ESA to intrastate, noncommercial species satisfies this Court's Commerce Clause test as set forth in *Lopez* and *Morrison*. He concludes it does not.

> There is no rational basis upon which Congress could conclude that such intrastate species have sufficient ties to interstate commerce to justify regulation under the Commerce Clause within the permissible scope defined by modern Supreme Court jurisprudence.

Id. at 650.

As expressed by Reden,

> Congress has constitutionally transformed the Commerce Clause into a tool used to slowly and impermissibly unsettle the balance of power between the States and the federal government, placing almost unfettered jurisdictional power in the hands of the federal government.

Id.

As a result, the author calls for judicial review:

> Where federal legislation, such as the ESA, unconstitutionally arrogates to the federal government powers properly belonging to the individual States, the judicial branch must intervene

> and enforce the notions of federalism the founding fathers envisioned.

Id.

Many circuit court judges also are calling for judicial intervention in the enforcement of the ESA. In the dissent to the denial of rehearing *en banc* in *GDF Realty* Judge Edith Jones authored a five-page opinion joined by Judges Jolly, Smith, DeMoss, Clement, and Pickering, that castigated the panel decision for authorizing unlimited congressional authority to regulate intrastate activities and pointed out the "obvious dissonance between the panel opinion and *Lopez*, *Morrison* and the Constitution." *GDF Realty*, 362 F.3d at 291-292. That dissonance, the dissent argued, "is that the Commerce Clause regulates commerce, not ecosystems." *Id.* at 292. Finally, the dissent noted that the federal circuits had recognized that otherwise constitutional enactments may be invalid in some applications and called for further appellate review in the case because "many applications of the ESA may be constitutional, but this one [the regulation of intrastate, noncommercial cave species] simply goes too far." *Id.* at 293.

The need for this Court to address the constitutional question raised here also is evident in the fact that among the circuit courts that have addressed the constitutionality of the ESA, the courts could not agree on the rationale that would support the ESA under the Commerce Clause. In his capacity as a circuit judge, Chief Justice Roberts called for further review to address a direct conflict that exists between the D.C. Circuit in *Rancho Viejo* and the Fifth Circuit in *GDF Realty*. *See Rancho Viejo, LLC v. Norton*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc). Judge Roberts urged further review to determine the proper constitutional basis for species regulation under the ESA. *Id.*

II

The Eleventh Circuit Has Decided an Important Federal Question in a Way That Conflicts with the Decisions of This Court

A. Under *Lopez*, Intrastate Activity May Be Regulated for Its Substantial Effects on Interstate Commerce Only If the Regulated Activity Is Economic in Nature

Alfonso Lopez, Jr., was indicted for violating the Gun-Free School Zones Act of 1990. *Lopez* 514 U.S. at 551. That Act made it a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). In 1992, Lopez, a 12th-grade student, arrived at school with a concealed .38 caliber handgun and five bullets. *Lopez*, 514 U.S. at 551. He was arrested and ultimately charged with a federal crime under section 922(q) of the Act. *Id.*

Lopez sought to dismiss the indictment as beyond the commerce power of Congress. *Id.* But the district court upheld the Act holding that section 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce." *Id.* at 551-552. On appeal, however, the Fifth Circuit reversed and held that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause," and this Court affirmed. *Id.* at 552.

Starting with first principles, this Court observed that the "Constitution creates a Federal Government of enumerated powers." *Id.* This principle was "adopted by the Framers to ensure protection of our fundamental liberties" by maintaining the balance of power between the States and the Federal Government so as to reduce the risk of abuse from either side. *Id.* As for the enumerated power delegated to Congress, "'to regulate commerce with foreign Nations, and among the several

States, and with the Indian Tribes,' Art. I, § 8, cl. 3," this Court emphasized the inherent limitations found in the very language of the clause. *Lopez*, 514 U.S. at 552-553.

When this Court first defined the commerce power in *Gibbons v. Ogden*, 22 U.S. 1 (1824), it recognized that

> [c]omprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

Lopez, 514 U.S. at 553 (citing *Gibbons*).

Another inherent limitation to the commerce power, recognized by this Court, was that the commerce power is the power to regulate or to "prescribe the rule by which commerce [itself] is to be governed." *Id.* In *Lopez*, this Court observed that even its expansive precedents in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard*, 317 U.S. 111, affirmed that the commerce power is "subject to outer limits." *Id.* at 557.

What are those limits? This Court admonished that the commerce power is constrained by our dual system of federal and state government and may not be stretched to encompass "indirect and remote" effects on interstate commerce so as to extinguish "the distinction between what is national and what is local and create a completely centralized government." *Id.* (citing *Jones & Laughlin Steel*).

This Court also took pains to characterize *Wickard* as the Court's "most far reaching example of Commerce Clause authority over intrastate activity." *Id.* at 560. But, this Court emphasized that at least that case involved actual *economic*

activity and that the Agricultural Adjustment Act upheld by this Court was a market scheme designed for the purpose of regulating national competition *in commerce* which was directly affected by home-grown wheat. *Id.* This Court concluded that it had always observed the constitutional structure, even in those cases where the congressional enactment was upheld based on "substantial effects," and that this Court's inquiry in such cases was always "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557.

After laying the foundation of a limited commerce power, this Court had no difficulty finding that the Gun-Free School Zones Act had exceeded Congress' Commerce Clause authority and was constitutionally invalid.

This Court readily determined that *Lopez* was a "substantial effects" case. For that determination, this Court looked at the object of section 922(q) and observed that the language of the Act, like the ESA in this case, did not purport to regulate the use of channels of interstate commerce or prohibit the interstate transportation of a commodity through the channels of commerce. *Id.* at 559. Likewise, because the statutory provision prohibited mere possession of a gun in a school zone, it could not be justified as a regulation to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Id.* at 561. If section 922(q) was to be upheld, it would have to be under the third category of Commerce Clause enactments—"as a regulation of an activity that substantially affects interstate commerce." *Id.* at 559.

First, this Court looked at the text of the statute and found that, unlike the act in *Wickard*, section 922(q) *by its own terms* had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. This obvious conclusion was compelled by the express language of the Act which made the mere possession of a firearm in a school zone a crime.

This Court also found that the regulated act, the possession of a gun, was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez* at 561. In fact, the Act was a criminal statute that did not involve a commercial or economic regulatory scheme at all. *Id.* Section 922(q) could not be sustained, therefore, under this Court's cases, like *Wickard*, that allowed congressional regulation of activities "that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce." *Id.* (emphasis added). Significantly, this Court came to this conclusion even though the prohibited activity, possession of a gun, involved a commercial item.

After rejecting the aggregation approach to sustaining the regulation of an intrastate activity that is *not* economic in nature, this Court sought next to determine whether section 922(q) contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce. *Id.* For that determination, this Court turned again to the language of the Act and found that it did not provide an express requirement that would "limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Because no substantial effect was "visible to the naked eye," in the text of the Act itself, this Court also looked to the legislative history to locate any express congressional findings that demonstrated Congress' belief that the possession of a gun in a school zone substantially affected interstate commerce. *Id.* at 562-563. But this Court found none.

Nevertheless, the government argued that Congress could rationally have concluded that section 922(q) did substantially affect interstate commerce because possession of a gun in a school zone may result in violent crime and violent crime

interferes with the national economy by increasing the cost of insurance and deterring people from traveling to unsafe areas. *Id.* at 563-564. The government also argued that guns in school undermine the learning environment, producing less productive citizens, which hurts the national economy. *Id.* at 564. To underscore the limitations on the commerce power, this Court addressed the implications of those arguments.

The government acknowledged under its "costs of crime" argument that Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce. *Id.* Likewise, this Court found that under the government's "national productivity" argument, Congress could regulate anything related to individual economic productivity. *Id.* If these arguments were accepted, this Court concluded it would be "hard pressed" to find any individual activity that Congress could not regulate under the commerce power. *Id.* "Depending on the level of generality," this Court observed, "any activity can be looked upon as commercial." *Id.* at 565.

This was the fallacy in the government's arguments; they provided no logical stopping point to congressional authority and converted the commerce power into a general police power like that enjoyed by the states. *Id.* at 567. Although some of this Court's earlier cases leaned in that direction and suggested a possible expansion of the commerce power, this Court set aside section 922(q) as an invalid Commerce Clause enactment and declined in *Lopez* to go any further. *Id.* "To do so," this Court stated, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-568 (citing *Gibbons* and *Jones & Laughlin Steel*).

B. Morrison Affirmed That the "Substantial Effects" Standard Applies to Intrastate Activity Only If the Activity Is Economic in Nature

Morrison is instructive because of what it says about this Court's decision in *Lopez*. In 1994, Christy Brzonkala enrolled at Virginia Polytechnic Institute. *Morrison*, 529 U.S. at 602. Shortly afterward, Brzonkala alleged she was raped by two fellow students, Morrison and Crawford. *Id.* When the Institute failed to punish the students, Brzonkala filed a suit in federal court against Morrison and Crawford under 42 U.S.C. § 13981 of the Violence Against Women Act of 1994. That Act provided a federal civil remedy for victims of gender-motivated violence and stated that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). But the district court dismissed the suit because it determined that section 13981 was an invalid Commerce Clause enactment. The *en banc* Court of Appeals and this Court both affirmed.

Returning to "first principles," this Court reaffirmed that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are limited. *Morrison*, 529 U.S. at 607. As this Court emphasized, "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *Id.* at 608.

Because section 13981 focused "on gender-motivated violence wherever it occurs" and was not directed at the instrumentalities of interstate commerce or interstate markets, or things or persons in interstate commerce, this Court determined the Act fell within the third category of Commerce Clause enactments and could only be sustained as a regulation of activity that "substantially affects" interstate commerce. *Id.* at 609. To conduct its analysis, this Court concluded that *Lopez* provided the appropriate framework. *Id.*

According to this Court, four factors contributed to the decision in *Lopez*. The first factor was that the statute, by its terms, had nothing to do with commerce or an economic enterprise; that is, the Act did not purport to regulate an economic activity. *Id.* at 610. The second factor was that the Act contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 611-612. This factor was important to establish that the Act was in "pursuance of Congress' regulation of interstate commerce." *Id.* at 612. The third factor was that neither the statute "nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce" of the regulated activity. *Id.* at 612. And, the fourth factor was that the connection between the regulated activity and a substantial effect on interstate commerce was remote. *Id.*

With this framework underlying this Court's Commerce Clause analysis, resolution of the *Morrison* case was clear. *Id.* at 613. First, this Court held, as it must, that the statute, by its terms, had nothing to do with commerce: "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* As a result, gender-motivated crimes are not the type of *economic* activity that, through repetition elsewhere, would substantially affect interstate commerce. *Id.* at 610-611. Not even *Wickard*'s economic aggregation principle was availing. *Id.* at 611 n.4.

This was critical to the outcome of the case. As the majority observed, the noneconomic, criminal nature of the prohibited activity in *Lopez* was central to its decision in that case. *Id.* at 610. But this Court did not stop there. To further illustrate the importance of this factor, this Court stated, as a matter of historical fact, that it had upheld federal regulation of intrastate activity based on its "substantial effects" on interstate

commerce *only* when the regulated activity was economic in nature. *See id.* at 611, 613.

Next, this Court held that the Violence Against Women Act did not contain an express "jurisdictional element" establishing that Congress was attempting to regulate interstate commerce. *Id.* at 613. Rather than limit its reach to a discrete set of gender-motivated violent crimes that had an explicit connection with or effect on interstate commerce, section 13981 was drawn too broadly and included purely intrastate violent crime. *Id.* The language of the Act did not support the conclusion, therefore, that section 13981 was adequately tied to interstate commerce. *Id.*

Unlike the situation in *Lopez*, however, this Court did find that the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce. *Id.* at 614. Among others, those effects included deterring victims from traveling interstate or engaging in interstate business. *Id.* at 615. Diminishing national productivity, increased medical costs, and a decrease in the supply and demand of interstate goods also were cited. *Id.* But because the regulated activity was not economic in nature, this Court did not believe that these findings were sufficient to uphold the Act under the Commerce Clause. *Id.* "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* at 614. That determination, the majority held, is for the courts to decide. *Id.*

Finally, because Congress followed the but-for causal chain from the original violent act to every remote effect upon interstate commerce, this Court decided that Congress' findings were faulty and relied on a "method of reasoning" that obliterates the distinction between what is national and what is local and which this Court had already rejected in *Lopez*. *Id.* at 615. Simply put, this Court was unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts

of violence, based only on that activity's attenuated effects on interstate commerce. *Id.* at 617. Therefore, this Court held that Congress did not have authority under the Commerce Clause to enact section 13981 of the Violence Against Women Act. *Id.* at 619.

C. The Listing of the Alabama Sturgeon, an Intrastate, Noncommercial Fish, Does Not Involve the Regulation of Economic Activity and Fails the *Lopez* and *Morrison* Standard for "Substantial Affects"

The Endangered Species Act authorizes federal regulation of threatened and endangered species. *See* 16 U.S.C. § 1533. As with the challenged provisions in *Lopez* and *Morrison,* the listing process is not directed at the use of channels or instrumentalities of interstate commerce or interstate markets, or things or persons in interstate commerce. *See Morrison*, 529 U.S. at 609. Thus, if the listing of the Alabama sturgeon is to be sustained, it will have to be as a regulation of activity that "substantially affects" interstate commerce. *Id.* Therefore, *Lopez* and *Morrison* provide the appropriate analytical framework for determining the listing's constitutional validity. *Id.*

As noted above, under that framework this Court looks at four factors: (1) Is the challenged federal action in furtherance of commerce or an economic enterprise; that is, does the action purport to regulate an economic activity? *Id.* at 610. (2) Is the federal action supported by an express "jurisdictional element" which might limit its reach to a discrete set of activities that "additionally have an explicit connection with or effect on interstate commerce?" *Id.* at 611-612. (3) Is the federal action backed by express "findings regarding the effects upon interstate commerce" of the regulated activity? *Id.* at 612. And, (4) is the connection between the regulated activity and a substantial effect on interstate commerce attenuated? *Id.*

The purpose of this overall inquiry is to determine "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557.

1. The Listing of the Alabama Sturgeon Has Nothing to Do with Economic Activity

Although the Eleventh Circuit acknowledged this Court's *Lopez* and *Morrison* decisions, it did not follow those decisions. Had it done so, it would have concluded that the listing of the Alabama sturgeon had nothing to do with economic activity and cannot be sustained under the "substantial effects" test established in those decisions. Under that test, the first step is to determine whether the federal action has anything to do with economic activity. Here, the Coalition challenges the listing of the Alabama sturgeon. The government concedes that the sturgeon is not a commercial fish and the species does not affect interstate commerce. *See* App. B8 n.4. But, more importantly, nothing in the listing process requires the species to have any connection with any commerce whatsoever. The listing of the Alabama sturgeon has by its own terms nothing to do with commerce or any sort of economic endeavor. In *Lopez*, this was decisive: § 922(q) *by its own terms* had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561.

Additionally, the listing of the Alabama sturgeon is "not an essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *See* Lopez, 514 U.S. at 561 (emphasis added). To the contrary, the ESA is a conservation statute that, like the statutes in *Lopez* and *Morrison*, does not involve a commercial or economic regulatory scheme at all. The regulation of the Alabama sturgeon cannot be sustained, therefore, under this Court's cases, like *Wickard*, that allow congressional regulation of activities "that arise out of or are

connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *See id.*

2. The Listing Includes No Express "Jurisdictional Element" That Would Limit It to Species That Have an Explicit Connection with Interstate Commerce

In its enforcement of the ESA, the Service lists all threatened or endangered species without regard to their effect on interstate commerce. This includes commercially harvested species that travel interstate, like certain salmon populations, as well as a rare species of fish, like the Alabama sturgeon, that is found only within a single state and has no economic value or commercial use.

Although the government could have limited its listings to commercial species, it did not do so. Instead it chose to cast its regulation "over a wider, and more purely intrastate" species —the Alabama sturgeon—that has no explicit connection with interstate commerce, like the failed actions in *Lopez* and *Morrison. See Morrison*, 529 U.S. at 613.

Indeed, the ESA requires that a listing determination rest *solely* on the biological status of the species and *does not allow* a consideration of the effects a species may have on interstate commerce. *See* 16 U.S.C. § 1533(a)-(b). Therefore, the listing of the Alabama sturgeon did not include any sort of jurisdictional element that would ensure the species substantially affects interstate commerce and that the government was acting "in pursuance of Congress' power to regulate interstate commerce." *See Morrison*, 529 U.S. at 613. *See also* 65 Fed. Reg. 26449-26450.

3. The Listing of the Alabama Sturgeon Is Not Supported by Express Findings Regarding the Effects of Intrastate, Noncommercial Species

Under *Lopez* and *Morrison*, a court may look to the Act and the congressional record for express findings that demonstrate Congress was legislating pursuant to its Commerce Clause authority. *Morrison*, 529 U.S. at 615. But under the ESA, Congress has made no express findings regarding the effects of intrastate, noncommercial species on interstate commerce generally. And, of course, the government admits there are no interstate commerce effects associated with the Alabama sturgeon specifically. The final rule itself contains no findings that show a relationship between the listing of the Alabama sturgeon and any interstate commercial activity.

That should end the inquiry because nothing in the record provides convincing support for the Eleventh Circuit's conclusion that Congress intended, or needed, to regulate interstate commerce by listing intrastate, noncommercial species. However, the court below makes much of general comments in the legislative history that Congress was concerned in the ESA with the "'incalculable' value of the genetic heritage that might be lost absent" federal regulation of threatened and endangered species. App. A1-A42.

The problem with this is twofold. First, at most, such broad statements indicate only Congress' assessment that protecting species is important. They do not in any way constitute a "finding," let alone an "express finding," that intrastate, noncommercial species, like the Alabama sturgeon, will have substantial effects on interstate commerce. And second, although legislative statements may reveal that Congress was concerned with interstate commerce, even express findings regarding the effects of the regulated activity on interstate commerce cannot be taken at face value. This Court was clear on that point in *Morrison*. Only the courts can

decide whether particular activities "affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them." *Morrison*, 529 U.S. at 614. The question is judicial, not legislative. *Id.* A question this Court should answer.

4. The Connection Between the Alabama Sturgeon and Interstate Commerce Is Attenuated

This Court's inquiry into whether the connection between the regulated activity and interstate commerce is attenuated is really a question of whether the theory supporting the connection provides a meaningful limit on federal regulatory authority. *See Morrison*, 529 U.S. at 615. Put another way, this Court wants to know if the regulation has a logical stopping point. If the government can use its authority to obliterate the Constitution's distinction between what is national and what is local, the courts must intervene and invalidate the regulation.

In *Lopez*, the government argued that violent crime substantially affects commerce and that violence in schools affects the productivity of the nation's citizens which, in turn, substantially affects commerce. But this Court found that argument went too far:

> Under the theories that the Government presents . . ., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 564.

Likewise, in *Morrison*, the government argued that Congress can regulate gender-motivated crime because violent

crime as a whole substantially affects interstate commerce. But this Court rejected that argument for the same reasons cited in *Lopez*. *See Morrison*, 529 U.S. at 615. If Congress can regulate violent crime because it has some ultimate effect on interstate commerce, Congress could similarly regulate any human endeavor because of its ultimate effect on commerce: "[D]epending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565.

Likewise, if the federal government can regulate a wholly intrastate, noncommercial species, and its habitat, like the Alabama sturgeon, because biodiversity (the genetic heritage) somehow affects interstate commerce, as the Eleventh Circuit held in this case, there is no activity that the government could not regulate. In this symbiotic world, virtually all physical endeavor has an effect on the biosphere which could affect biodiversity and, ultimately, through a chain of but-for causation, interstate commerce. Thus, by this line of reasoning which this Court expressly rejected in *Lopez*, the federal government could regulate (indeed even control) whole areas of historical state authority such as local land use, local water use, or even individual consumption and obliterate the distinction between what is national and what is local.

5. This Court's *Raich* Decision Did Not Change the "Substantial Effects" Test Established in *Lopez* and *Morrison*

The Eleventh Circuit in this case relied on a misinterpretation of this Court's recent decision in *Raich* for its conclusion that the listing of the Alabama sturgeon does not exceed Congress' commerce power. According to the court below, "When Congress can and has regulated a class of activities, we 'have no power to excise, as trivial, individual instances of the class.'" App. A41 (citing *Raich*, 545 U.S. at 23). Were this the law, this Court would not have invalidated the Gun-Free School Zones Act in *Lopez* or the Violence

Against Women Act in *Morrison*. This is a mischaracterization of the current state of the law and this Court's *Raich* decision.

In *Raich*, this Court considered whether the use and distribution of home-grown marijuana could be prohibited by the federal government under the Controlled Substances Act. In addressing that question, this Court did not overrule *Lopez* or *Morrison*. Those cases are still controlling. *Raich*, like *Wickard*, constituted a special circumstance not applicable here.

Just as the Agricultural Adjustment Act in *Wickard* regulated the entire national market in wheat, the Controlled Substances Act in *Raich* regulated the entire national market in drugs. And, as with the home-grown wheat in *Wickard*, the use of locally grown marijuana in *Raich* involved an actual market commodity. In *Raich* this Court cited *Wickard* for the proposition that Congress can regulate intrastate activity involving a fungible commodity if failure to regulate that class of activity would undermine "regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 2. Additionally, this Court observed:

> The similarities between [*Raich*] and *Wickard* are striking. In both cases, the regulation is squarely within Congress' commerce power *because* production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Id. (emphasis added)

Of course, the ESA is not a regulation of a national market nor does the regulation of an intrastate, noncommercial species, like the Alabama sturgeon, involve a market commodity. Therefore, *Raich* is not controlling in this case as the Eleventh Circuit held.

CONCLUSION

The government listed the Alabama sturgeon as an endangered species after determining the sturgeon did not have *any* effect, let alone a substantial effect, on interstate commerce. This exercise of federal power conflicts with this Court's Commerce Clause cases which demonstrate that this Court has upheld federal regulation of intrastate activity, based upon the activity's substantial effects on interstate commerce, only when the activity has been economic in nature. Nevertheless, in putative reliance on this Court's recent decision in *Raich*, the Eleventh Circuit in this case adopted a boundless interpretation of the commerce power that extends federal regulation to a rare species of fish—the Alabama sturgeon—that is found in only one state and has no commercial use. Review of this case by this Court is therefore necessary to determine the scope of the commerce power.

DATED: September, 2007.

Respectfully submitted,

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Appendix A1

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 05-17164

ALABAMA-TOMBIGBEE RIVERS COALITION, an Alabama nonprofit corporation, PARKER TOWING COMPANY, INC., an Alabama corporation, CHARLES A. HAUN, an individual,

Plaintiffs-Appellants,

v.

DIRK KEMPTHORNE, Secretary of the United States Department of the Interior, SAM HAMILTON, Regional Director of the United States Fish and Wildlife Service, U.S. DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, an agency of the United States Department of the Interior, STEVE WILLIAMS, Director of Fish and Wildlife Service,

Defendants-Appellees.

Filed February 8, 2007.

Before CARNES, MARCUS and KRAVITCH, Circuit Judges.

CARNES, Circuit Judge:

Two fish, or not two fish? That is the question. More specifically, are the Alabama sturgeon and the shovelnose sturgeon separate species? The answer lies primarily in the field of taxonomy, which one observer has noted "is described sometimes as a science and sometimes as an art, but really it's a battleground." Bill Bryson, *A Short History of Nearly*

Everything 437 (2003). The battle over the Alabama sturgeon has been more like the Thirty Years War. A scientist first classified this small freshwater fish found in the Mobile River Basin of Alabama as endangered in 1976. Three decades and three trips to this Court later the fight over whether the Alabama sturgeon is an endangered species continues. On one side are various business interests, including the Alabama-Tombigbee Rivers Coalition, and on the other are the Fish and Wildlife Service and several federal officials involved with it.

I.

The background facts of this litigation are set out in our 2003 opinion. *See Alabama-Tombigbee Rivers Coal. v. Norton* (*Alabama-Tombigbee II*), 338 F.3d 1244 (11th Cir. 2003). We won't wade back through all of the facts but will instead focus on those essential to the issues raised in this appeal.

The Alabama sturgeon was once so plentiful that it was captured commercially. *Id.* at 1247-48. At the end of the nineteenth century, an estimated 20,000 of the fish were caught commercially, but its numbers have declined drastically and it is now thought to reside only in small portions of the Alabama River channel in south Alabama and downstream to the mouth of the Tombigbee River. Final Rule to List the Alabama Sturgeon as Endangered, 65 Fed. Reg. 26,438, 26,339-41 (May 5, 2000) (to be codified at 50 C.F.R. pt. 17) ("Final Rule"). The historic decline of the species—if it is a species—is due to a combination of over-fishing, dam construction for power production, dredging and channeling to improve navigation in the Mobile River Basin, and declines in water and habitat quality resulting from river and land management practices. *Id.* The Service began to study the decline of the Alabama sturgeon in 1980, four years after a scientist first classified it as endangered. *Id.* at 26,439; Review

of Three Southeastern Fishes, 45 Fed. Reg. 58,171 (Sept. 2, 1980).

In June 1993, the Fish and Wildlife Service first proposed listing the fish as an endangered species under the Endangered Species Act of 1973. Final Rule at 26,441. That proposed listing led to these litigants' first visit to our Court, when the Alabama-Tombigbee River Coalition, a group of industries and associations opposed to the listing, obtained an order from the United States District Court for the Northern District of Alabama granting a permanent injunction against the Service's use of a scientific report prepared in violation of the Federal Advisory Committee Act in making its listing determination. *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior* (*Alabama-Tombigbee I*), 26 F.3d 1103, 1104 (11th Cir. 1994). The Service appealed, and we affirmed. *Id.* at 1107. Several months later, the Service withdrew the proposed listing "on the basis of insufficient information that the Alabama sturgeon continued to exist." Final Rule at 26,442.

Over the next few years, the capture of several Alabama sturgeon confirmed that the fish was still around, although barely—despite diligent efforts to locate the fish, there were only eight confirmed catches in the 1990s—and in 1999 the Service again proposed listing the Alabama sturgeon as endangered. *Id.* at 26,439-40, 26,442. On May 5, 2000, it issued a final rule listing the fish as an endangered species. *Id.* at 26,438. Although the Service is responsible for designating the "critical habitat" of land animals and freshwater fish, it did not do so at the time it issued the Final Rule. *Id.* at 26,456-57. And it still has not done so.

The Coalition brought suit under the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(1), and under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, alleging several defects in the listing

process. *Alabama-Tombigbee II*, 338 F.3d at 1249. The district court dismissed the Coalition's lawsuit for lack of standing, but on appeal we reversed after concluding that the Coalition did have standing to challenge the listing decision. *Id.* at 1250-51, 1256.

On remand, the district court granted the Service's motion for summary judgment but ordered it to issue both a proposed and a final rule designating critical habitat for the Alabama sturgeon by May 14, 2006 and November 14, 2006, respectively. The Coalition appealed the judgment, which the district court stayed pending review by this Court.

We review the district court's grant of summary judgment *de novo*, viewing the facts and drawing all reasonable inferences in favor of the nonmoving party. *Rowell v. BellSouth Corp.*, 433 F.3d 794, 798 (11th Cir. 2005). However, "even in the context of summary judgment, an agency action is entitled to great deference." *Pres. Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs (PEACH)*, 87 F.3d 1242, 1246 (11th Cir. 1996). Under the Administrative Procedure Act, we must set aside any agency action that is arbitrary, capricious, or an abuse of discretion, 5 U.S.C. § 706(2)(A), but we cannot substitute our judgment for that of the agency. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 824, 28 L. Ed. 2d 136 (1971). We look at "whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Sierra Club v. Johnson*, 436 F.3d 1269, 1273-74 (11th Cir. 2006) (internal quotation marks and citations omitted).

II.

The Coalition first contends that we must vacate the Final Rule because the Fish and Wildlife Service failed to consider

the relevant factors in reaching its listing decision. Section 4(b)(1)(A) of the ESA requires the Service to make listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A) (codifying Section 4(b)(1)(A)). The Coalition argues that the Service failed to rely on the best scientific data available in three ways: First, it discounted genetic typing in favor of morphological taxonomy. Second, the agency did not examine the best available taxonomic data. Third, it allegedly interfered with the research of one of its employees, Dr. Steven Fain.

The Administrative Procedure Act instructs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We "may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983). Under this "narrow" form of review, we may find a rule arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43, 103 S. Ct. at 2867. The reviewing court may not make up for these deficiencies, which is to say that "we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285, 95 S. Ct. 438, 442, 42 L. Ed. 2d 447 (1974).

Appendix A6

A.

The Coalition's first argument in support of its contention that the Service failed to consider the best scientific data is that it used "the older, subjective method of morphological taxonomy" instead of "the modern, objective science of genetics," to classify the Alabama sturgeon as a separate species. Genetics is the superior science, according to the Coalition, and in its view "[a]ll reliable genetic evidence" confirms that the Alabama sturgeon and the more-abundant shovelnose sturgeon are "genetically identical."

The Service responds by arguing that the Coalition is creating a false dichotomy between "taxonomy" and "genetics." "Taxonomy" is "the science or technique of classification" or the "science dealing with the description, identification, naming, and classification of organisms." Random House Unabridged Dictionary 1947 (2d ed. 1993). "Genetics," which is "the science of heredity, dealing with resemblances and differences of related organisms resulting from the interaction of their genes and the environment," *id.* at 796, is one tool—but not the only tool—used to resolve taxonomic questions.

The Service believes that instead of relying on genetics alone, "[t]he most scientifically credible approach to making taxonomic determinations is to consider all available data involving as many different classes of characters as possible." Final Rule at 26,452. The class of relevant characters "includes morphological, karyological (chromosomal), biochemical (including DNA analysis and other molecular genetic techniques), physiological, behavioral, ecological, and biogeographic characters." *Id.* The Service argues that it did consider genetics, and simply concluded that the available genetic studies could not definitively resolve the taxonomic status of the Alabama sturgeon, and that the balance of the relevant data supported classifying the fish as its own species.

Appendix A7

1.

The Coalition overstates its case when it asserts that "[a]ll reliable genetic evidence" confirms that the Alabama sturgeon and the shovelnose sturgeon are "identical." The two types of fish are not "genetically identical." If two complete samples of animal genetic material truly are identical, then they did not just come from the same species, they came from the same animal (or perhaps from a pair of twins). What the evidence tendered by the Coalition actually reveals is that when scientists have examined particular segments of the mitochondrial cytochrome *b* gene, a gene that scientists often test to help them distinguish between vertebrate species, they have found that the cytochrome *b* samples taken from those particular genetic segments of the Alabama sturgeon are very similar—not identical, but very similar—to those taken from shovelnose sturgeon.

At several points in the Final Rule, the agency addressed the significance of genetic testing. *See id.* at 26,438-39, 26,445-46, 26,451-52. It found that the genetic evidence was much less lopsided—and much more consistent with other taxonomic indicators—than the Coalition suggests. The Service distinguished between three types of genetic studies. First were the studies of the mitochondrial cytochrome *b* gene which we have already mentioned. *Id.* at 26,438. The agency agrees with the Coalition that one study by Schill and Walker "found no sequence divergence in a cytochrome *b* mtDNA sequence between a single specimen of the Alabama sturgeon and shovelnose sturgeon." *Id.* at 26,451. A subsequent study by Fain *et al.* using a larger sample size found small but consistent differences between Alabama and shovelnose sturgeon, though the study concluded that these differences were too insignificant to support the use of cytochrome *b* testing in criminal prosecutions. *Id.* at 26,451-52.

The second type of genetic study discussed in the Final Rule examined the "d-loop" or "control region" of the sturgeons' mitochondrial DNA. *Id.* at 26,452. In 1995, Campton *et al.* found that a unique haplotype (a single insertion point on a genetic chain) distinguished the Alabama sturgeon from pallid and shovelnose sturgeon. *Id.* at 26,438. However, the Campton report cautioned that this level of divergence was small, and suggested adding sturgeon from the lower Mississippi River to the study. In 1999, the Campton group completed phase II of that study, which included sturgeon from the lower Mississippi River. The phase II results were consistent with those of phase I, leading the scientists to conclude that "[t]hese mtDNA results provide the first genetic evidence that the three species of [sturgeon] are indeed distinct evolutionarily and thus support current conservation efforts to protect pallid and Alabama sturgeon as endangered species under the ESA." A study by Mayden *et al.* found the differences in the d-loop to be significant even after factoring in the similarity of the sturgeons' cytochrome *b* genes. It concluded that "the Alabama sturgeon and the shovelnose sturgeon were found to exhibit significant genetic heterogeneity based on both the control region sequences and the control region and cytochrome *b* combined data sets."

The third type of study discussed in the Final Rule examined nuclear DNA. Final Rule at 26,438, 26,445. A 1994 study by Genetic Analyses, Inc. found that "when the total available nuclear DNA markers are assessed, considerable genetic differences between the Alabama and both shovelnose and pallid sturgeon individuals are observed," but noted that "this result is based upon only one individual" Alabama sturgeon specimen. In 1995, Genetic Analyses tested two additional Alabama sturgeon specimens. This further examination "supports previous results indicating substantial genetic divergence of Alabama sturgeons from the other two recognized [sturgeon] species," leading Genetic Analyses to

conclude that "the data presented here suggest strongly that Alabama sturgeons are more genetically divergent from pallid and shovelnose sturgeons than the latter taxa are from each other."

After addressing individually each type of genetic study in the administrative record, the Service expressed its general doubt that examination of genetic data could definitively resolve the Alabama sturgeon's taxonomic status. The Service explained in the Final Rule:

> Genetic data have their greatest utility in making species-level taxonomic determinations when the putative species are sympatric (occur together) and the degree of natural genetic interaction can be evaluated. When the putative species are allopatric, as with Alabama and shovelnose sturgeons, genetic data provide a measure of divergence that must be evaluated along with all other available measures of divergence in making a determination whether species-level differences exist. When sample sizes are small, either in terms of number of individuals or number of genetic regions or loci tested, the taxonomic value of genetic data is diminished.

Id. at 26,452. The Service specifically questioned the value of cytochrome *b* studies:

> Cytochrome *b* is not the best choice of a genetic region for resolving the closely related species in the genus *Scaphirhynchus*. In such cases it is appropriate to examine a gene region known to have a faster rate of evolution that might be reflected in a difference between species. The study of Campton *et al.* (in press) employed the more rapidly evolving control region of mtDNA with the results described under

> Issue 59. Campton *et al.* (in press) also discuss other cases where speciation has occurred in fishes with very little genetic divergence in cytochrome *b*, and Fain *et al.* (2000) identifies lack of divergence between pairs of other sturgeon species. Interpreted in light of the minimal gene regions studied, the small sample sizes of Alabama sturgeon, and evidence from other species that species formation can occur with minimal detectable genetic differentiation in DNA regions commonly studied, the genetic data are consistent with and do not demand the rejection of taxonomic conclusions based on morphological and biogeographical data that the Alabama sturgeon qualifies for recognition as a valid species.

Id.

The Coalition emphasizes the fact that the cytochrome *b* genes of the Alabama sturgeon and the shovelnose sturgeon are very similar. As it points out, the Service uses cytochrome *b* testing to criminally prosecute defendants for violating federal species protection laws. According to the Fain report, examination of the cytochrome *b* gene can be used to positively identify fifteen of the world's twenty-seven sturgeon and paddlefish species. The implication the Coalition wishes us to draw is that if the Service considers cytochrome *b* testing to be conclusive enough for criminal prosecutions, it ought to be conclusive enough for rule making as well.

This argument misapprehends both the conclusions of the Fain study and the role of cytochrome *b* testing in criminal trials. The Fain study did not conclude that the Alabama sturgeon is not a distinct species. The report of that study states that the 5' end of the cytochrome *b* gene exhibits significant interspecific variation in sturgeon, which is to say that some species of sturgeon have very different cytochrome *b* genes than

other species of sturgeon. When the cytochrome *b* genes of two species of sturgeon vary significantly from one another, but their intraspecific variation, or variance among individual members of each species, is low, the gene provides a useful marker to distinguish between the two types of sturgeon. Under these conditions, scientists can use cytochrome *b* testing to debunk a criminal defendant's false claim that caviar taken from an endangered species of sturgeon came from another non-endangered species.

The Fain report also states that cytochrome *b* testing cannot be used to distinguish between caviar from Alabama sturgeon and caviar from shovelnose sturgeon with sufficient reliability to be useful for forensic identification. The Coalition argues that because cytochrome *b* testing cannot reliably prove that the Alabama sturgeon is a distinct species, it must not be. Holding a position of centrality in that argument is the idea that inconclusive results of difference are conclusive proof of sameness. The reasoning is a species of *argumentum ad ignorantiam*, a fancier, and hence less denigrating, way of describing "an argument from ignorance." An argument from ignorance is "the mistake that is committed whenever it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true." Irving M. Copi & Carl Cohen, *Introduction to Logic* 93 (8th ed. 1990). Our point is that difficulty in proving a proposition (particularly by only one method) does not prove its opposite.

Of course, an argument from ignorance is not always a fallacy. Under some circumstances, such as where a scientific inquiry produces a complete knowledge base, or where an experiment is certain to reveal a fact if that fact exists and it fails to do so, the lack of positive evidence can prove a negative—the absence of evidence can be conclusive evidence. *Cf. id.* at 94. But not here. Examining one mitochondrial DNA

gene hardly provides scientists with a total picture of the entire Alabama sturgeon genome, which would be necessary for a complete knowledge base. There are a multitude of mitochondrial and nuclear genes in every species of animal. That one particular gene does not demonstrably vary between two species is not, by itself, exceptional. Humans and chimpanzees, in genetic terms, are nearly 99% identical, yet we generally have little difficulty distinguishing between the two species. Michael D. Lemonick et al., *What Makes Us Different?*, Time, Oct. 9, 2006, at 44.

Differences in the cytochrome *b* gene often correlate with speciation in vertebrates, but the Service had a reasonable basis for believing that gene would not serve as an effective, species-differentiating genetic marker in this case. Final Rule at 26,452. Biogeographic evidence indicates that the Alabama and shovelnose sturgeon diverged only within the past 10,000 years, an eyeblink in evolutionary terms, and speciation can outpace differentiation of the cytochrome *b* marker which would explain the absence of a detectable difference. *Id.* The rule making record included evidence of other separate species of fish with very little genetic divergence in the cytochrome *b* gene. *Id.*

The decreased utility of the cytochrome *b* marker in younger species, combined with some evidence of divergence at other genetic markers, creates substantial doubt about whether genetic typing can conclusively resolve the proper taxonomic classification of the Alabama sturgeon. At a minimum, it justifies the Service's decision to examine the entirety of the taxonomic record, rather than ending its analysis with the DNA results. We now turn to the taxonomic evidence.

The Service began its examination of the taxonomic evidence by reviewing the existing literature, which revealed that:

> [t]he Alabama sturgeon is nationally and internationally considered a valid species. The Alabama sturgeon was initially described as a distinct species in a peer-reviewed, widely distributed museum periodical. The species was considered valid in a catalog of fishes of Alabama and in a catalog of fishes of North America. Species status was reassessed, reaffirmed, and published in the ichthyological journal *Copeia*. The Alabama sturgeon is listed as a separate species in State fish books for Alabama and Mississippi. The Alabama sturgeon is listed as a valid species in a catalog of fishes of the world. Birstein *et al.* included the Alabama sturgeon in a list of all sturgeon species of the world. The Alabama sturgeon is considered a distinct and valid species by the American Society of Ichthyologists and Herpetologists, and by the Southern Fishes Council Technical Advisory Committee. Thus, the Alabama sturgeon is currently recognized as a valid taxonomic species and will continue to be so recognized unless overturned at some future date by the scientific community through the formal publication and peer review process.

Id. at 26,443 (internal citations omitted).

The Service acknowledged that some scientists have questioned the taxonomy of the Alabama sturgeon, but noted that the only thorough taxonomic treatment of the species since the fish was first described, which was done by Mayden and

Kuhajda, concluded that the sturgeon was a distinct species. *Id.* Only one peer-reviewed paper—the Bartolucci *et al.* study—questions the taxonomy of the Alabama sturgeon. The Service found that study to be less probative than the Mayden and Kuhajda study, and also against the weight of the remainder of the taxonomic record. *Id.*

The Service then supplemented the existing literature by requesting that five academicians who possessed expertise on Alabama sturgeon and shovelnose sturgeon taxonomy review the proposed rule. *Id.* at 26,453. Of the four who responded to the Service's request, all expressed their belief that the data supported protecting the sturgeon under the Endangered Species Act. *Id.* Three peer reviewers "strongly supported the taxonomic status of the Alabama sturgeon." *Id.* The remaining reviewer "expressed some personal doubt regarding the taxonomic status of the Alabama sturgeon," but concluded that the fish represented at least a subspecies or unique population eligible for protection under the Act. *Id.* That reviewer also described the Mayden and Kuhajda article, which had come down on the separate species side of the question, as convincing. *Id.* The fifth proposed reviewer did not respond to the Service's request to engage in peer review, but provided comments opposing the listing at the public hearing. *Id.*

Only after reviewing the existing literature and the additional expert opinions did the Service conclude that the available genetic evidence did not compel the conclusion that the Alabama sturgeon was not a separate species. The agency considered every available genetic study, but found that none were decisive on the issue. Two types of studies—the control region and nuclear DNA studies—supported the Service's ultimate conclusion. While the cytochrome *b* genes of the Alabama sturgeon and the shovelnose sturgeon are nearly identical, this fact is consistent with the theory that the two species began to diverge only recently (in evolutionary terms)

when the Alabama sturgeon became isolated in the Mobile River Basin approximately 10,000 years ago. *Id.* at 26,446. It does not rule out the two types of fish being separate species. The Service's decision to read the mixed genetic data in conformity with the remainder of the taxonomic record, which supported classifying the Alabama sturgeon as a distinct species, was not arbitrary and capricious.

B.

The Coalition's second argument in support of its contention that the Service failed to consider the best scientific data is that the taxonomic evidence in the administrative record demonstrates that the Alabama and shovelnose sturgeons are the same species. We have just discussed the reasoning behind the Service's conclusion that the Alabama sturgeon is a distinct species and the studies underlying that reasoning. The Coalition contends, however, that the Service "blatantly cherry-picked" a few taxonomic studies to support its position. It argues that "the Final Rule references, but erroneously discounts" studies that oppose classifying the Alabama sturgeon as a unique species.

The Coalition characterizes the Service as dismissing Bartolucci's study "primarily because it was published in a 'statistically oriented journal and not in a zoological, ichthyological, or systematics journal.'" Putting aside whether that reason alone would justify discounting Bartolucci's findings, the Final Rule deals with that study more thoroughly than the Coalition lets on:

> Only a single peer-reviewed paper has been published that questions the taxonomy of the Alabama sturgeon (Bartolucci *et al.*1998). However, that publication was a methods paper concerning a statistical approach to compare the significance of morphological

> characters. It was published in a statistically oriented journal and not in a zoological, ichthyological, or systematics journal, and it made no attempt to formally revise the taxonomy of the Alabama sturgeon. We received letters from ichthyologists during the comment period pointing out shortcomings of Bartolucci *et al.* (1998) for taxonomic purposes. In a review of the systematics and taxonomy of the Alabama sturgeon, Mayden and Kuhajda (1996) presented new data, addressed many of the criticisms of the original description, and substantiated species status for the Alabama sturgeon . . . The [Bartolucci study] did not identify the measurement data that were analyzed, nor was the source of their data cited. Dr. Bartolucci later clarified in submissions at the June 1999 public hearing on the proposed rule that data provided by Williams and Clemmer (1991) were used. In addition, Bartolucci *et al.* (1998) did not review, criticize, or even reference the Mayden and Kuhajda (1996) evaluation of the taxonomy and systematics of the Alabama sturgeon, and additional mensural (based on measurements) and meristic (based on counts) data, as well as new diagnostic characters presented by Mayden and Kuhajda (1996) were not addressed.

Id. at 26,443-44. The Coalition points to two other studies that the Service addressed only summarily in its Final Rule, but as the Service points out, those studies were not made available for review by the ichthyological community through peer review and publication. *Id.* at 26,443.

Given the nature of taxonomy, it would be surprising if there were not some disagreement about the proper classification of the Alabama sturgeon, but disagreement in the field does not preclude agency decision making. "When

specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861, 104 L. Ed. 2d 377 (1989). This principle does not mean that the agency has wholesale latitude to arbitrarily dismiss relevant scientific data, 16 U.S.C. § 1533(b)(1)(A), but that is not what happened. The Service's finding that the Alabama sturgeon is a separate species is consistent with the position of the American Society of Ichthyologists and Herpetologists on the question and is supported by the conclusion of the only peer-reviewed article published in an ichthyological journal addressing the issue, by the opinion of the Service's own experts, and by the views of most of the academicians asked to comment on the question. Given all of that support for the view taken in the Final Rule, we will not find that the Service failed to consider the best scientific evidence simply because it decided not to credit the contrary view, which is contained in one article published in a statistical journal and in several unpublished reports.

C.

The third argument behind the Coalition's contention that the Service failed to consider the best scientific data is that it wrongfully interfered with the research of Dr. Steven Fain. Before the Service issued the Final Rule, Mike Howell, a scientist working for the Coalition, sent an e-mail seeking to discuss with Fain the genetic similarity between the Alabama sturgeon and the shovelnose sturgeon. Fain initially appeared receptive to discussing the issue, but later quit communicating with Howell. He did so after speaking with Paul Hartsfield, a Service biologist.

Apparently, Hartsfield began to inquire into what Fain was doing—and with whom he was doing it—after the Coalition told the Service that it had requested samples of an Alabama sturgeon specimen from the Alabama Department of Conservation and Natural Resources so that the Coalition could conduct its own DNA work. Service officials asked the Department to whom it had sent the samples, and were told that they had been sent to Fain. Hartsfield was understandably surprised to learn that one of the Service's own scientists was conducting studies for an interested party in an agency rule making. He e-mailed his supervisor, asking if Fain comprehends "the taxonomic problems and implications" of the work he was doing and inquiring, "can we afford to call him off?" Another e-mail refers to the value of Hartsfield having a "frank talk" with Fain.

After a little investigation, the Service determined that Fain was unaware that Howell was passing his work on to the Coalition. Hartsfield spoke with Fain over the telephone, explained Howell's affiliation with the Coalition, and the two men "had a very good discussion about taxonomy and cytochrome *b*." Hartsfield followed up the phone call by sending Fain copies of all of the relevant research in his possession.

The facts in the administrative record do not demonstrate that the Service sought to squelch Fain's research or control his opinion. They show that the Service initially inquired into whether one of its scientists was moonlighting for an interested party in a pending rule making. Once the Service determined that Fain was simply sharing research that he was conducting in the course of his employment, Hartsfield told Fain a key fact that Howell had failed to disclose: Howell was not a disinterested scientist but was instead affiliated with the Coalition. Hartsfield also offered to send Fain copies of prior research in the area. There was nothing improper about that.

Even if we assume that Service officials engaged in improper conduct towards Fain, the Coalition's argument still fails for two reasons. First, it has presented no evidence that Fain altered his study as a result of the Service's conduct. The Coalition highlights the fact that Fain uses more cautious language in his final report than he did in his initial e-mail to Howell. Fain's "quick note" to Howell stated that "[w]e've sequenced only one sample . . . and its sequence is identical to pallid and shovelnose sturgeon . . . [w]e are currently canvassing all 250 of the Scaphirhynchus samples we have . . . . I agree with your proposal to consider all three as conspecific." His final report is arguably more equivocal than that statement, but Fain wrote the e-mail to Howell after he had sequenced only a single sample, before he had reviewed the Mayden and Kuhajda study, and six months before completing his final report. That final report, which Fain co-authored with two other scientists, examined ninety-nine sturgeon specimen and referred to twenty-five prior publications on genetic testing and sturgeon taxonomy. Scientists may spend months or years painstakingly producing and checking findings before publication, even though they, like everyone else, may fire off in a matter of minutes a "quick note" containing an initial inclination or beginning hypothesis. It is not at all surprising that a scientific paper about a completed study would use different language, or even reach a different conclusion, than a six-sentence e-mail sent at the very beginning of the study.

Second, even if Fain did temper his language as a result of some higher-up's meddling, that fact would not establish that the Service violated the Endangered Species Act's mandate to consider the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). The Coalition agrees that the final report of Fain's study is "entirely consistent" with the tentative views reflected in his e-mail to Howell in 1999. Its criticism is that the final report did not state his views as explicitly as the e-mail did. Fain's views are clear enough to have been properly

considered, as they were, by the Service. The Endangered Species Act requires the Service to make its listing determination on the basis of the best scientific data available; it does not require scientists who produce reports relevant to the listing decision to achieve a particular level of clarity in stating their views.

If Fain had stated in the most unequivocal terms that the Alabama and shovelnose sturgeon have the same cytochrome *b* gene, which is what the Coalition says he should have done, it would not have altered the analysis in the Final Rule. The Service properly characterized Fain's report as showing an "absence of detectable differences" between the sturgeons' cytochrome *b* genes, but reasonably concluded that this similarity "only attests to the very close evolutionary relationship" between the species. Final Rule at 26,445. The Service's decision is not based on the Alabama sturgeon and the shovelnose sturgeon having dissimilar cytochrome *b* genes, and would be the same no matter how definitively the Fain report had stated that they do not.

The Coalition, which acquired the e-mails relating to this issue that we have quoted through a public records request, contends that the district court abused its discretion by refusing to allow additional discovery on the subject. "The focal point for judicial review of an administrative agency's action should be the administrative record." *PEACH*, 87 F.3d at 1246. Though certain circumstances may justify the district court going beyond the administrative record, it is not generally empowered to do so. *Id.* It should do so only where there is initially "a strong showing of bad faith or improper behavior" by the agency. *Overton Park*, 401 U.S. at 420, 91 S. Ct. at 825. Here, because the Coalition failed to make such a showing, we conclude that the district court did not abuse its discretion in disallowing the discovery the Coalition sought. *See PEACH*, 87 F.3d at 1246.

III.

The Coalition's second contention is that even if the Fish and Wildlife Service did consider all the relevant factors and make the listing decision on the basis of the best scientific data available, the Final Rule containing that decision still must be vacated because the Service violated Section 4 of the Endangered Species Act. That section requires the Service to designate the critical habitat of a species concurrently with its decision to list the species as endangered. Section 4 twice mentions a concurrence requirement.

The relevant provisions read:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and *to the maximum extent prudent and determinable*—
>
> (i) *shall, concurrently with making a determination . . . that a species is an endangered species* or a threatened species, *designate any habitat* of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A) (emphasis added). Later, the section provides: *A final regulation designating critical habitat* of an endangered species or a threatened species *shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened*, unless the Secretary deems that—

> (i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or
>
> (ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

16 U.S.C. § 1533(b)(6)(C) (emphasis added). The Service did not designate critical habitat of the Alabama sturgeon when it issued the Final Rule on May 5, 2000 listing the fish as endangered, and it has not done so in the six-and-a-half years since then.

In the proposed rule, which was issued in 1999, the Service determined that it would not be "prudent" to designate critical habitat at that time. Proposed Rule to List the Alabama Sturgeon as Endangered, 64 Fed. Reg. 14,676, 14,683 (proposed Mar. 26, 1999) (to be codified at 50 C.F.R. pt. 17) ("Proposed Rule"). As a result of feedback received during the public comment period, however, the Service was persuaded that designation would be prudent. Final Rule at 26,456. It nonetheless declined to designate critical habitat in the Final Rule, instead finding that the Alabama sturgeon's habitat was not then "determinable." *Id.* Under Section 4(b)(6)(A) of the Act, the Service must normally issue a final rule designating critical habitat within one year of issuing a proposed habitat designation. *See* 16 U.S.C. § 1533(b)(6)(A) (Section 4(b)(6)(A)). However, Section 4(b)(6)(C) allows the Service to

extend this one-year period by an additional year if critical habitat is not determinable at the time of the listing decision, provided that it designates habitat to the maximum extent prudent by the end of that additional year. The Service exercised this option, which means that it had a maximum of two years from the date the Final Rule was published to issue a final rule designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(C) (Section 4(b)(6)(C)).

The Coalition asked the district court to vacate the Final Rule containing the listing decision because of the Service's failure to designate critical habitat concurrently with the publication of the Final Rule. The Service conceded that it had violated the Act by failing to designate critical habitat for the Alabama sturgeon by the end of the two-year period following the publication of the Final Rule. The district court, however, refused to order what it described as "the extraordinary and unprecedented remedy of vacating the listing decision in its entirety thus causing the Service to begin the listing process of the Alabama Sturgeon anew." Instead, the court ordered the Service to complete the habitat decision within two years of the conclusion of this appeal. The effect is to give the Service more time to designate critical habitat than the Act allows.

A.

The district court's remedy is improper, according to the Coalition, because the failure to propose and designate critical habitat at the same time that the endangered species listing is being proposed and decided undermines the accuracy of the listing decision itself. Providing notice of critical habitat designation may encourage some who would not otherwise do so to participate in the public comment process for the listing decision. The more people who know they will be affected, the more who may participate. The additional participation could conceivably affect the Service's analysis and modify the

decision contained in the Final Rule. The law, after all, provides notice and an opportunity to be heard because it may make a difference. Not only that, the Coalition argues, but the literal language of the Endangered Species Act can be satisfied only by starting the listing process anew, because no other result will allow the listing decision and the habitat designation decision to be issued "concurrently."

The Coalition's standing to raise this challenge does not flow from any harm that it suffers from the Service's failure to actually designate critical habitat, because the Coalition is not injured by that. Indeed, it would prefer that critical habitat never be designated. The harm the Coalition claims is that the failure to propose critical habitat may have reduced participation in the rule making process resulting in a flawed decision to list the Alabama sturgeon as an endangered species, and we have held that the listing decision does threaten the Coalition with harm. *See Alabama-Tombigbee II*, 338 F.3d at 1252-54.

In *Sierra Club*, we held that "a plaintiff has established procedural injury standing if he has established that the claimed violation of the procedural right caused a concrete injury in fact to an interest of the plaintiff that the statute was designed to protect." 436 F.3d at 1278. In that case, we vacated an order by the Environmental Protection Agency that failed to object to issuance of a Clean Air Act permit by a state that had not implemented a required mailing list to notify the public of the proposed action and of the comment period. *Id.* at 1279-80. We reasoned that use of the mailing list would have led to additional public input, which in turn could have improved the permitting process. *Id.* at 1279. Applying the logic of *Sierra Club* to this case, we agree with the Coalition that it has standing to litigate whether there is a procedural right in the Endangered Species Act to public notice, during the comment

period on a listing decision, of the area that may be designated as critical habitat.

Standing to raise a claim is one thing, the merits of the claim is another. If there is a procedural right to notice during the comment period of what the critical habitat may be, that right cannot be found in the text of the Act or in its history. Neither indicates that notice of proposed habitat designation is meant to be a participation booster for the listing decision. The language of the Act does not require the Service to publish a proposed habitat designation simultaneously with the proposed listing, nor does it require that the Service publish its proposed habitat designation prior to the close of the comment period on the proposed listing. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (requiring that the Service make a final habitat determination concurrently with the listing decision); *id.* § 1533(b)(5)(A) (allowing the Service to publish its proposed habitat designation "not less than 90 days before the effective date" of the final habitat designation). Instead, the Service may delay habitat designation by up to two years when it finds that designation is not "determinable." *Id.* § 1533(b)(6)(C)(ii).

Nor is there anything in the history of the Act to support the Coalition's position. As originally enacted in 1973, the Act did not even use the term "critical habitat." Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884. However, the Act did require all federal agencies to take "such action necessary to insure that actions authorized, funded, or carried out by them do not . . . result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." *Id.* § 7. The Act required the Service to give general notice of listing decisions, but provided no guidance on how or when it should determine a species' critical habitat. *Id.* § 10(B)(1).

Congress became aware of the significance of designating a species' critical habitat when the Supreme Court issued its decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978). In that case the Supreme Court upheld the Service's decision to protect the critical habitat of a small number of snail darters, a three-inch fish, which "would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million." *Id.* at 172, 98 S. Ct. at 2291. Within five months after the *Hill* decision, Congress amended the Act to provide a narrow definition of the term "critical habitat" and to establish a new set of public notice requirements for the designation of habitat. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751. Those 1978 amendments applied the general notice requirement for listing decisions to critical habitat determinations, and they required that notice of the proposed habitat be given in an area newspaper of general circulation and in appropriate scientific journals, and that actual notice be given to local governments. *Id.* The amendments also added the requirement that "[a]t the time [a listing] is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat." *Id.* (emphasis added).

It did not take long for Congress to have second thoughts about the 1978 amendments. In the three years following those amendments, only one new species proposed for listing successfully navigated both the listing and habitat designation processes. S. Rep. No. 97-418, at 4 (1982) ("Senate Report"). In the view of the Senate committee with jurisdiction over the subject, "[t]he listing process under section 4 of the current law ha[d] been seriously hampered since the 1978 amendments to the Act." *Id.* at 11. The requirement that the Secretary propose critical habitat "at the time a species is proposed" had "indirectly introduced economic considerations into the listing

process by requiring the Secretary to consider the economic impact of specifying the habitat." *Id.* "[A]s a result of numerous procedural requirements and the absence of meaningful time limits, the listing process ha[d] come to a virtual standstill." *Id.* at 4. The Senate committee's proposed amendments replaced the language from the 1978 Amendments that the Service designate tentative critical habitat at the time it issues the proposed listing with the modern "concurrently" requirement. H.R. Conf. Rep. No. 97-835, at 19-20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860 ("Conference Report"). It also shortened the time line for acting on listing decisions and streamlined the notice process. *Id.* at 20.

The relevant House committee had similar concerns. In recommending reauthorization of the Act, it issued a report stating that "[o]ne of the principal problems noted was the decline in the pace of listing species." H.R. Rep. No. 97-567, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807 ("House Report"). The House committee believed that tentatively designating critical habitat in the proposed listing "adds some confusion to the listing phase." *Id.* at 11-12. The need to take into account "the economic impacts of listing such habitat as critical" had slowed the listing process to a crawl. *Id.* The House bill included the Senate's requirement that the critical habitat be listed "concurrently," and also specified that listing decisions must be based "solely" on the basis of the best scientific and commercial data available. Conference Report at 20.

The Senate and House bills went to conference. The Conference Committee adopted the amendment included by both chambers of Congress to strike the language that had been added in 1978 requiring that critical habitat be designated in the proposed listing. *Id.* at 19. It instead added the "concurrently" requirement and specified that the Service must "designate critical habitat at the time a species is listed." *Id.* at 24

(emphasis added). The Conference Committee then adopted the Senate's proposed time provisions and the House's limitation on economic analysis in listing decisions. *Id.* at 20. After those amendments, which were enacted into law in 1982, Pub. L. No. 97-304, no part of the Act—including Section 4(a)(3)(A) and Section 4(b)(6)(C)—required the Service to propose critical habitat at the time of the proposed listing of the species as endangered. 16 U.S.C. § 1533(a)(3)(A); *id.* § 1533(b)(6)(C). The only requirement was that the Service designate critical habitat concurrently with its final listing decision, if doing so then would be prudent and if the habitat would be determinable at that time.

The requirement that the Secretary designate habitat concurrently with the final listing decision, which is the current version of the law, could not have been intended to increase public participation in the listing process. It could not have been because under that provision the Service need not (indeed, if "concurrently" is read strictly, it must not) designate critical habitat until the moment it reaches a final listing decision. By then the public comment period on the listing decision will have closed. Of course, the Service could propose critical habitat before the close of the comment period for the final listing decision, but nowhere in the Act is the Service obligated to do so. There is nothing in the Act to prevent the Service from proposing the listing, receiving comments about it and then, after that comment period has closed, proposing critical habitat and receiving comments about it. For that reason, we cannot say that the concurrence requirement was designed to spur greater public participation in the listing decision process.

We do not think that this lack of synchronization is the result of a Congressional oversight. One of the primary purposes of the 1982 amendments was to divorce from the listing decision the economic analysis that comes with critical habitat designation. *See* Senate Report at 11; House Report at

11-12; Conference Report at 19. The amendments added the word "solely" before the phrase "on the basis of the best scientific and commercial data available" to insulate the listing decision from the influence of economic factors. 16 U.S.C. § 1533(b)(1)(A); Senate Report at 4, 11; House Report at 20; Conference Report at 19. While "economic analysis" is meant to "offer[ ] some counter-point to the listing of species without due consideration for the effects on land use and other development interests," Congress wanted "to prevent [habitat] designation from influencing the decision on the listing of a species," and for that reason intended that the "balancing between science and economics should occur subsequent to listing through the exemption process." House Report at 12 (emphasis added); *cf.* Senate Report at 4. The Coalition's position runs counter to Congressional intent.

That Congress did not intend the word "concurrently" to spur participation in the listing process does not mean that it was blind to the value of public input into agency action. The Act requires the Service to publish notice both of proposed listing decisions and of proposed critical habitat designations, 16 U.S.C. § 1533(b)(5), but it does not require that notice of the proposals be published concurrently. The language of the concurrence requirement applies only to the final decisions: "concurrently with making a determination," *id.* § 1533(a)(3)(A)(i); and "[a] final regulation designating critical habitat . . . shall be published concurrently with the final regulation [listing the species]," *id.* § 1533(b)(6)(C), and even then, there are escape valves that permit the habitat designation decision to come as long as two years after the final listing decision.

The problem that the 1982 amendments were aimed at was that difficulties in designating critical habitat were slowing to a virtual standstill the listing process. Congress uncoupled the two to some extent by removing the requirement, which had

been added during the 1978 amendments, that habitat designation be proposed at the same time the listing was. Although Congress did not want delays in designating critical habitat to hamper listings decisions, if it had simply removed the time limits it imposed in 1978 the Service would have had free range to indefinitely postpone habitat designation. By adding the concurrence requirement Congress provided a deadline which requires, with the escape clauses considered, that within two years of the proposed listing of the species as endangered, the Service "must designate to the maximum extent prudent, on the basis of such data as may be available at that time, critical habitat of such species." Conference Report at 24. The term creates a "mandatory, nondiscretionary duty" that the Secretary designate critical habitat within the time specified. Senate Report at 13; *see also* Conference Report at 20.

For this reason, we are unpersuaded by the Coalition's assertion that if we do not read "concurrently" to require concurrent proposals that term will serve no purpose. The purpose it serves is to prevent the Service from putting off indefinitely—more than two years after the final listing decision—the designation of critical habitat for a listed species. 16 U.S.C. § 1533(b)(6)(C).

The only other provisions governing the timing of critical habitat designation are reflexive: Section 4(b)(5) requires the Service to provide general notice of a habitat designation "not less than 90 days" before its final decision on habitat designation, and Section 4(b)(6)(A) requires the Service to make a final decision "within the one-year period beginning on the date on which general notice is published," subject to the one-year extension under Section 4(b)(6)(C). 16 U.S.C. §§ 1533(b)(5), (b)(6)(A)-(C). It is the requirement that the regulation designating critical habitat "be published concurrently with" the listing decision that forces the Service to

start those other clocks ticking. The Service's failure to designate habitat concurrently with (or within two years of) its decision to list the Alabama sturgeon as endangered places it behind on its statutory responsibilities, but it does not necessarily mean that the Service has violated any procedural notice rule in the Act.[1]

If this case were being decided under the Endangered Species Act as it existed between the time of the 1978 and the 1982 amendments, the Coalition would have a much stronger case. During that interval, the Act provided that: "At the time [a listing] is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L.

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[1] We note that unlike the Endangered Species Act, the Service's own regulations do require that "[c]ritical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing." 50 C.F.R. § 424.12(a) (2006) (emphasis added). We decline to address the question of whether the Service complied with its own regulatory notice provision when it found that designation of critical habitat in the proposed rule would not be prudent. Proposed Rule at 14,682-83. The Coalition has never argued that the Service's determination in the proposed rule that designation was not prudent was erroneous. At oral argument, counsel for the Coalition said: "We are not addressing the 'not prudent' exception." The Coalition did not cite Section 424.12(a) to us until its reply brief, and then only for the proposition that the Service "failed to state any sufficient reasons supporting its 'not determinable' finding . . . ." Any argument the Coalition might have made about the regulatory notice requirement has been forfeited. *United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir.2001) ("[O]ur well established rule is that issues and contentions not timely raised in the briefs are deemed abandoned.").

No. 95-632, 92 Stat. 3751 (emphasis added). Congress modified the critical language, uncoupling the species listing and habitat designation, or at least moving the coupling forward to the final rule stage, leaving the Service free to make the proposals at different times with comment periods that do not overlap. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411. The use of the word "concurrently" refers to the final decisions, not to the initial proposals. For these reasons we do not believe that the Endangered Species Act provides a procedural right to have the critical habitat proposal issued at the same time as the listing proposal, or to have the habitat proposed before time runs out for commenting about the listing.

B.

That said, this too should be said. We are troubled by the Service's apparent practice of routinely delaying critical habitat designation until forced to act by court order. *See Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1103 (D. Ariz. 2003). The Congressional Research Service reports that, as of 1999, the Service had designated critical habitat "for only about 10% of listed domestic species; in every case brought against the agency for failure to designate [critical habitat], the agency has lost." M. Lynne Corn, *Endangered Species: Continuing Controversy*, CRS Issue Brief for Congress, at CRS-7 (Nov. 21, 2000). The Senate Committee on Environment and Public Works after examining the Service's practices, concluded that "[p]roblems with critical habitat have been chronic over the life of the ESA." S. Rep. 106-126, at 2 (1999).

The Service's motives for delaying designation of critical habitat may have changed over the years. Before enactment of the 1982 amendments, critics accused the executive branch of stalling on habitat designation to derail protection for species

entirely. *See, e.g.*, Endangered Species Act Oversight, Hearings before the Subcomm. on Envtl. Pollution of the S. Comm. on Env't and Pub. Works, 97th Cong. 53-54 (1981) (statement of Patrick Parenteau, Vice President, National Wildlife Federation); *id.* at 278-79 (statement of Michael Bean, Counsel, Environmental Defense Fund). Other critics have charged that during the late 1990s the Department of the Interior may have simply viewed the Service's failure to designate critical habitat as an acceptable budgetary policy. James Rasband *et al.*, *Natural Resources Law and Policy* 353-54 (2004). Most of the protections afforded endangered species attach as soon as the species is listed, and it would be reasonable to believe that the resources required to collect and analyze critical habitat data could better be spent on listing additional species. *Id.*

At oral argument in this case counsel for the government, explaining the Service's failure to comply with the statutory deadlines for designating habitat for the Alabama sturgeon, characterized the Service as "chronically underfunded to meet its obligations under [the] statute." The Service, like all agencies, undoubtedly would be better able to carry out all of its statutory duties if it could appropriate funds for itself, but under our separation of powers that is the prerogative of the legislative branch. As a result, the same legislature that has enacted standards for an executive agency's performance can through the appropriations process effectively prevent the agency from meeting those standards. The problem of "unfunded mandates" is not limited to federal-state relations. We do not know and have no occasion to decide whether that is what is at work here.

Regardless of the cause, it is clear that the Service chronically fails to meet its statutory duty of designating critical habitat of endangered species within the time the Endangered Species Act requires. *See Norton*, 240 F. Supp. 2d at 1103. The Coalition argues that a stronger remedy is needed than the

order the district court issued, which requires the Service to designate the Alabama sturgeon's critical habitat within two years of the conclusion of this case (apparently meaning two years after the end of this appeal). Of course, the Coalition is not interested in any remedy that would force the Service to designate the fish's habitat sooner instead of later. Instead, the Coalition's proposed remedy, which coincides perfectly with its interest, would not only delay the designation of habitat for many more years but would also strip the Alabama sturgeon of the protection that being listed provides. What we ought to do, the Coalition argues, is overturn the listing decision as a sanction for the Service's failure to designate habitat on time. That would teach the Service not to disregard Congressional requirements, the Coalition assures us.

It would also make a bad situation worse, and defeat the Congressional intent behind the Endangered Species Act. As the Supreme Court stated in *Hill*, "[t]he dominant theme pervading all Congressional discussion of the proposed [Endangered Species Act of 1973] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources." 437 U.S. at 177, 98 S. Ct. at 2293 (internal quotation marks omitted) (alterations in original). Congress intended to protect endangered species, not to strip them of protection in order to motivate an administrative agency to protect them.

The Alabama sturgeon is a fish so near extinction that the Service withdrew its first attempt to list it as endangered because there was then no evidence that the species still existed. Final Rule at 26,441-42. Four thousand man hours of fishing effort on the rivers produced a total of five Alabama sturgeon. *Id.* at 26,440. Requiring the Service to re-start the listing process now could condemn the Alabama sturgeon to extinction. That result probably would not bring tears to the

collective eyes of the Coalition, but it is not one to which the group is entitled. The Endangered Species Act does not require that a species be destroyed in order to preserve a part of the process meant to save it.

The legislative history of the Act contains repeated statements indicating that Congress meant for species to be protected by listing decisions even if determination of their critical habitats were delayed. The Conference Report for the 1982 amendments states:

> If at the end of the one-year period (or 18 month period) provided for in new Section 4(b)(6) the scientific and commercial information indicates that the species should be listed but the analysis necessary to determine and designate critical habitat has not been completed, the Secretary must comply with the new Section 4(b)(6) time requirement and promulgate the proposal to list as a final regulation.

Conference Report at 24 (emphasis added). Likewise, the Senate Report states:

> At the end of such 12 month period (or 18 month period, if an extension occurs), the Secretary must make a final determination with respect to the listing proposal. He must determine, on the basis of the information then available, either that the species should be listed or delisted, or that the proposal for listing or delisting should not be promulgated as a final regulation.

Senate Report at 14. Nothing in the language of either report suggests an exception to the listing requirement even if a court concludes that the Service intentionally delayed designation of critical habitat, which is not surprising because one of the

principal purposes of the 1982 amendments was to prevent delays in habitat designation from holding up a listing decision.

The House Report accompanying the 1982 amendments is even more emphatic. It repeatedly states that a delay in habitat designation should never be used to delay the listing of a species. First, the Report states:

> The Committee feels strongly, however, that where the biology relating to the status of the species is clear, it should not be denied the protection of the Act because of the inability of the Secretary to complete the work necessary to designate critical habitat.

House Report at 19. Then it states:

> The Committee expects the agencies to make the strongest attempt possible to determine critical habitat within the time period designated for listing, but stresses that the listing of a species is not to be delayed in any instance past the time period allocated for such listing if the biological data is clear but the habitat designation process is not complete.

Id. at 20. And then a third time:

> At the end of the one year period, if the scientific evidence indicates that the species should be listed, the Secretary must do so regardless of whether the analysis necessary to designate critical habitat has been completed.

Id. at 21-22. And then a fourth time:

> The Committee intends that this [six month extension to the listing period] apply only to those instances

> where the biological status of the species is being questioned by scientists knowledgeable about the species and not to allow additional time for the economic or other analyses related to the designation of critical habitat.

Id. at 22. And finally, in case anyone missed the import of its first four statements, the House Committee states in its report that under the Act:

> If, for whatever reason, a critical habitat is not designated at the end of the required period, the original listing of the species is not withdrawn.

Id. To throw out a congressionally mandated listing decision because of the Service's failure to comply with time limits for making a habitat decision would defeat, not further, congressional intent.

It may be that in an appropriate case a court should use its contempt powers or fashion some creative remedy to spur the Fish and Wildlife Service on with habitat designation. But delisting is not creative, it is destructive. A species in free fall needs all the protection it can get. We would not cut the cords of a skydiver's main parachute to punish the jump master for failing to pack the fellow a reserve chute. Any beneficial effect that sanction might have on the jump master's future performance would come at too high a cost to the poor soul hurtling toward the earth at terminal velocity. And so it is here. We will not order that the Alabama sturgeon be stripped of the protection that the listing decision provides as a remedy for the failure of the Service to extend to the creature the additional benefit that comes from designation of critical habitat. Removing one protection is not a fit remedy for the lack of another.

IV.

The Coalition's third contention is that the Final Rule should be vacated because Congress has exceeded the power granted to it under the Commerce Clause by authorizing protection of the Alabama sturgeon, which the Coalition characterizes as an intrastate, noncommercial species. In the Coalition's view, protecting the Alabama sturgeon is not one of the three categories of activities Congress may regulate using its Commerce Clause powers. *See United States v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 1629-30, 131 L. Ed. 2d 626 (1995); *United States v. Morrison*, 529 U.S. 598, 608-09, 120 S. Ct. 1740, 1749, 146 L. Ed. 2d 658 (2000). As the Supreme Court has recently summarized the law in this area, there are three permissible exercises of congressional authority over commerce: "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S. Ct. 2195, 2205, 162 L. Ed. 2d 1 (2005) (citations omitted). The parties agree that the third category or power, regulating activities that substantially affect interstate commerce, is the one at issue here.[2]

The Coalition's argument starts with the proposition that the Alabama sturgeon is a purely intrastate species with little, if any, commercial value, as evidenced by the fact that there

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[2] Defenders of Wildlife, filing as amicus curiae, contends that protection of the Alabama sturgeon is also defensible as a congressional regulation of the channels of interstate commerce, a first category activity. We need not address that contention in order to resolve this appeal.

have been no reported commercial harvests of the fish in more than a century. Because the Alabama sturgeon cannot be commercially harvested, the Coalition reasons that protecting the fish is a non-economic activity akin to those that the Supreme Court held in *Lopez* and *Morrison* could not be regulated by Congress. And if protecting the Alabama sturgeon does not involve the regulation of activities that "arise out of or are connected with a commercial transaction," we are not permitted to view the effect of species loss "in the aggregate" to find a substantial connection to interstate commerce. *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631.

The Service counters that three circuits, in four published opinions issued since *Lopez*, have already upheld the constitutionality of Congress authorizing the Fish and Wildlife Service to list a purely intrastate species as endangered under the Endangered Species Act. *See GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1052-54 (D.C. Cir. 1997). No circuit has held to the contrary. Meanwhile the Supreme Court has had the Endangered Species Act before it several times but has never questioned its constitutionality. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995); Hill, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed.2d 117. Not only that, but last year in *Raich* the Supreme Court cited the prohibition on "takes" of eagles in the Bald and Golden Eagle Protection Act, which is a close cousin to the Endangered Species Act's "take" provision, as an example of "a rational (and commonly utilized) means of regulating commerce." 545 U.S. at 26 n.36, 125 S. Ct. at 2211 n.36. *Compare* 16 U.S.C. § 668 (declaring it illegal to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import" a bald eagle), *with* 16 U.S.C.

§ 1538(a)(1) (declaring it illegal to "take," "possess, sell, deliver, carry, transport, or ship," or "sell or offer for sale" an endangered or threatened species).

The Coalition characterizes its claim as an as-applied challenge to the Final Rule, and its briefs are carefully tailored to the argument that federal protection of the Alabama sturgeon, which is one homely looking fish to be found only with the greatest effort in one river system in one state, does not concern commerce or economic activity. Nonetheless, the necessary first step in addressing its challenge is an examination of the total economic impact of the Endangered Species Act itself. In *Lopez*, the Supreme Court held that aggregation of economic effects is permissible where the federal action in question is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561, 115 S. Ct. at 1631; *see also United States v. Ballinger*, 395 F.3d 1218, 1250 (11th Cir. 2005) (en banc) (Birch, J., dissenting) ("Realizing that certain acts which are wholly intrastate in character may affect interstate commerce, and thereby frustrate Congress' express power to regulate interstate commerce, the Supreme Court has permitted federal regulation of such activity where it substantially affects interstate commerce in the aggregate.").

In *Raich*, the Court upheld the application of provisions in the Controlled Substances Act criminalizing the manufacture, distribution, and possession of marijuana to intrastate growers and users of marijuana for medicinal purposes. 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1. In doing so, the Court explained the statement it had made in *Lopez* regarding the regulation of intrastate activity as part of a larger regulation of economic activity: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate

commerce." *Id.* at 17, 125 S. Ct. at 2205 (citing *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 1359, 28 L. Ed. 2d 686 (1971); *Wickard v. Filburn*, 317 U.S. 111, 128-29, 63 S. Ct. 82, 90-91, 87 L. Ed. 122 (1942)). The courts "have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* at 17, 125 S. Ct. at 2206 (citing *Perez*, 402 U.S. at 154-55, 91 S. Ct. at 1361-62).

This principle poses a problem for the Coalition's as-applied challenge, because "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* (quoting *Lopez*, 514 U.S. at 558, 115 S. Ct. at 1629). If the process of listing endangered species is "an essential part of a larger regulation of economic activity," then whether that process "ensnares some purely intrastate activity is of no moment." *Id.* at 24, 125 S. Ct. at 2209; *id.* at 22, 125 S. Ct. at 2209; *see also Gibbs*, 214 F.3d at 497 (applying *Lopez*'s "essential part of a larger regulation" test to the Endangered Species Act). When Congress can and has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Raich*, 545 U.S. at 23, 125 S. Ct. at 2209 (quotation marks and citations omitted).

We agree with the three circuits that have concluded the Endangered Species Act is a general regulatory statute bearing a substantial relation to commerce. *See GDF*, 326 F.3d at 640; *Rancho Viejo*, 323 F.3d at 1073; *Gibbs*, 214 F.3d at 497. The Coalition does not argue to the contrary, nor could it do so persuasively. The Act prohibits all interstate and foreign commerce in endangered species. 16 U.S.C. § 1538(a)(1)(F). Although the true size of an illegal market is difficult to gauge, the United Nations Environment Programme estimates the illegal component of the worldwide trade in wildlife generates

$5 billion to $8 billion in proceeds annually. *See* Int'l Inst. for Env't & Dev. & Traffic Int'l, Making a Killing or Making a Living 12 (2002). Other reports state that the trade in wildlife products comprises the world's second largest black market, trailing only trade in illegal narcotics. *See id.* The United States is not a bit player in this market. The Service conservatively estimates that Americans pay $200 million annually for illegally caught domestic animals and $1 billion for those illegally caught in other countries. *See* Christine Fisher, Comment, Conspiring to Violate the Lacey Act, 32 Envtl. L. 475, 478 (2002).

The commercial impact of the Endangered Species Act is even greater than those large numbers suggest, because the economic value of endangered species extends far beyond their sale price. The House Report accompanying the Endangered Species Act explains that as human development pushes species towards extinction, "we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable." H.R. Rep. No. 93-412, at 4 (1973). Biodiversity's value is not ethereal; its preservation produces economic gain in even the most narrow sense. For example, species diversity is essential to medicine. Half of the most commonly prescribed medicines are derived from plant and animal species. *See Gibbs*, 214 F.3d at 494; *NAHB*, 130 F.3d at 1052-53. Nine of the ten most commonly used prescription drugs in the United States are derived from natural plant products. Ecological Soc'y of Am., *Ecosystem Services: Benefits Supplied to Human Societies by Natural ecosystems*, 2 Issues in Geology 1.6 (1997).

Genetic diversity is also important to improving agriculture and aquaculture. As the D.C. Circuit explained in *NAHB*, "the genetic material of wild species of plants and animals is inbred into domestic crops and animals to improve their commercial value and productivity." 130 F.3d at 1053. Of the explosive

growth in this nation's farm production since the 1930s, genetic diversity is responsible "for at least one-half of the doubling in yields of rice, soybeans, wheat, and sugarcane, and a three-fold increase in corn and potatoes." *Id.*; *see also Gibbs*, 214 F.3d at 495 (noting that wildlife management can help agriculture by protecting crops and livestock). The growing use of genetic modification in aquaculture, meanwhile, may prove essential to meeting the rising world demand for fish and fishmeal. *See* Christopher L. Delgado *et al.*, The Future of Fish 2-6 (Int'l Food Policy Research Inst. 2003).

A species' simple presence in its natural habitat may stimulate commerce by encouraging fishing, hunting, and tourism. A Fish and Wildlife Service report found that in 2001 recreational anglers spent $35.6 billion, recreational hunters spent $20.6 billion, and wildlife watchers spent $38.4 billion. United States Fish & Wildlife Serv., 2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 4 (2001); *see also Gibbs*, 214 F.3d at 493 (describing wildlife-related tourism's substantial effect on interstate commerce). The report estimated direct expenditures only, and the total commercial impact of each activity may be greater still. A 1996 estimate found that recreational anglers alone had "a nationwide economic impact of about $108.4 billion, support[ed] 1.2 million jobs, and add[ed] $5.5 billion to Federal and State tax revenues." United States Fish & Wildlife Serv., Final Environmental Impact Statement Double-crested Cormorant Management in the United States 43 (2003). All of the industries we have mentioned—pharmaceuticals, agriculture, fishing, hunting, and wildlife tourism—fundamentally depend on a diverse stock of wildlife, and the Endangered Species Act is designed to safeguard that stock.

Just as it is apparent that the "comprehensive scheme" of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce, it is clear that the

listing process is "an essential part" of that "larger regulation of economic activity." *Raich*, 545 U.S. at 22, 24, 125 S. Ct. at 2209-10. The decision to list a species as endangered or threatened is a necessary precondition to the protections afforded species under the Act. There would be no point to the Act if no species could be listed as endangered or threatened. *See generally* 16 U.S.C. § 1538 (Section 9's "prohibited acts").

The Coalition does seek a more narrow remedy than a declaration that Congress' delegation of listing authority to the Service is unconstitutional. It wants us to treat the Alabama sturgeon, a purely intrastate species, separately from all species that have demonstrated commercial value. Congress could have excluded all intrastate species from the scope of the Endangered Species Act, but it chose not to do so. This court has "no power to excise, as trivial, individual instances of the class." *Raich*, 545 U.S. at 23, 125 S. Ct. at 2209 (internal quotation marks and citation omitted). The only remaining question before us "is whether Congress' contrary policy judgment, i.e., its decision to include this narrower 'class of activities' within the larger regulatory scheme, was constitutionally deficient." *Id.* at 26, 125 S. Ct. at 2211. That depends on whether Congress could have rationally concluded that the regulation of intrastate species was an essential part of the larger regulatory scheme. *Id.* at 26-27, 125 S. Ct. at 2211.

There are several reasons for Congress' decision to regulate all endangered species, instead of only interstate ones. For one thing, Congress was concerned with "the unknown uses that endangered species might have." *Hill*, 437 U.S. at 178-79, 98 S. Ct. at 2294. The extinction of species poses the risk that humanity may lose forever the opportunity to learn some of nature's secrets. Deforestation drove the rosy periwinkle, a delicate pink flower native to Madagascar, nearly to extinction before scientists discovered that it contained two substances now used to treat childhood leukemia and Hodgkin's

lymphoma. Cheryl Wittenauer, Mission is to Protect and Preserve; Conservationists Target Native Plants, S.D. Union-Trib., May 11, 2003, at A9. Inside fragile living things, in little flowers or even in ugly fish, may hidden treasures lie. Because Congress could not anticipate which species might have undiscovered scientific and economic value, it made sense to protect all those species that are endangered. *See GDF*, 326 F.3d at 632 ("Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.") (alteration and citation omitted). Because a species' scientific or other commercial value is not dependent on whether its habitat straddles a state line, Congress had good reason to include all species within the protection of the Act. It did not behave irrationally by taking the broader approach.

Congress also recognized "the unforeseeable place such creatures may have in the chain of life on this planet." *Hill*, 437 U.S. at 178-79, 98 S. Ct. at 2294; *GDF*, 326 F.3d at 640. As biologist Edward O. Wilson explained: "Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage." *NAHB*, 130 F.3d at 1053 n.11 (quoting Edward O. Wilson, The Diversity of Life 308 (1992)). An insect with no apparent commercial value may be the favorite meal of a spider whose venom will soon emerge as a powerful and profitable anesthetic agent. That spider may in turn be the dietary staple of a brightly colored bird that people, who are notoriously biased against creepy crawlers and in favor of winsome winged wonders, will travel to see as tourists. Faced with the prospect that the loss of

any one species could trigger the decline of an entire ecosystem, destroying a trove of natural and commercial treasures, it was rational for Congress to choose to protect them all.

Congress also reasoned that protection of an endangered species could "permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels." *See* S. Rep. No. 91-526, at 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415; *see also Gibbs*, 214 F.3d at 495 (documenting how successful conservation efforts for the American alligator has restarted a trade in alligator hides). The Alabama sturgeon is potentially an example of that congressional hope. It was once harvested commercially, and over harvesting was one of the factors in the species' decline. Final Rule at 26,440-41. The protection the Endangered Species Act affords may one day allow the replenishment of its numbers and eventual, controlled commercial exploitation of the fish. Indeed, this possibility underscores the fundamental irony in the Coalition's position. Under the Coalition's theory, Congress is free to protect a commercially thriving species that exists in abundance across the United States because it has economic worth, but once economic exploitation has driven that species so close to the brink of extinction that it desperately needs the government's protection, Congress is powerless to act.

As the Fourth Circuit stated in *Gibbs*, "[s]uch reasoning would eviscerate the comprehensive federal scheme for conserving endangered species and turn congressional judgment on its head." *Gibbs*, 214 F.3d at 498. That result need not be, because just as Congress has the power to preserve its right-of-ways over unused railroad lines for use in future commerce, *Preseault v. Interstate Commerce Comm'n*, 494

U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990), it has the power to protect and nurture endangered species so that controlled commercial exploitation of those species may someday resume. *See Gibbs*, 214 F.3d at 496 (applying *Preseault* to the Endangered Species Act). Speaking for the Supreme Court, Holmes expressed a related thought this way: "But for the treaty and statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed." *Missouri v. Holland*, 252 U.S. 416, 435, 40 S. Ct. 382, 384, 64 L. Ed. 641 (1920).

These reasons collectively convince us that Congress was not constitutionally obligated to carve out an exception for intrastate species from the otherwise comprehensive statutory scheme that is the Endangered Species Act. The issue, therefore, does not turn on the present or potential commercial value of the Alabama sturgeon alone. Even if we found a commercial nexus completely lacking here, we could not "excise individual applications of a concededly valid statutory scheme." *Raich*, 545 U.S. at 72, 125 S. Ct. at 2237 (quotation marks omitted).

The Coalition makes only passing note of Congress' power to regulate intrastate activities as part of a comprehensive regulatory scheme. It casts the *Raich* decision as part of a peculiar two-case sequence along with *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942). Both of these cases, the Coalition notes, involve circumstances in which intrastate consumption of a fungible good could affect demand for that good in the interstate market.

We are not convinced that the principle that Congress may regulate some intrastate activity as an essential part of a larger permissible regulation is limited to the facts of *Raich* and

Wickard. The principle has a much richer history. *See Perez v. United States*, 402 U.S. 146, 151-53, 91 S. Ct. 1357, 1360-61, 28 L. Ed. 2d 686 (1971) (tracing the history of the "class of activities" principle through ten Supreme Court decisions). The decisions espousing and applying the principle are concerned not merely with commodities pricing, but with ensuring sufficient deference to Congress' legislative authority. *See id.* at 154, 91 S. Ct. at 1361 ("[W]e acknowledged that Congress appropriately considered the 'total incidence' of the practice on commerce . . . . Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." (citations omitted)). As the Court explained in *Hodel v. Indiana*: "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole" can survive a Commerce Clause challenge. 452 U.S. 314, 329 n.17, 101 S. Ct. 2376, 2386 n.17, 69 L. Ed. 2d 40 (1981).

Because of the depth of the decisional law, the Coalition's assertion that *Raich* "was not a major development in Commerce Clause jurisprudence," may be right, but not for the reason the Coalition argues. *Raich* is but the logical application of the Court's prior Commerce Clause jurisprudence. The discussion in *Raich* of the effect of intrastate marijuana use on national drug prices was not intended to limit to the sale of fungible goods a doctrine that had already been applied to discriminatory accommodations, *see Katzenbach v. McClung*, 379 U.S. 294, 302, 85 S. Ct. 377, 383, 13 L. Ed. 2d 290 (1964), to fair labor standards, *see Darby*, 312 U.S. at 115, 61 S. Ct. at 451, 457-58, to extortionate credit transactions, *see Perez*, 402 U.S. at 154, 91 S. Ct. at 1361, and to mining safety standards, *see Hodel*, 452 U.S. at 329, 101 S. Ct. at 2386. Instead, the Court's discussion of commodity pricing in *Raich* was part of its explanation of the rational basis Congress had for thinking that regulating home-consumed marijuana was an essential part

of its comprehensive regulatory scheme aimed at controlling access to illegal drugs. 545 U.S. at 19, 125 S. Ct. at 2207.

This case, like *Raich*, also turns on whether Congress had a rational basis for believing that regulation of an intrastate activity was an essential part of a larger regulation of economic activity. Unlike the statute involved in *Raich*, Congress did not rely on commodity pricing in justifying the Endangered Species Act. Instead, it made a determination that the most effective way to safeguard the commercial benefits of biodiversity was to protect all endangered species, regardless of their geographic range. That rational decision was within Congress' authority to make.

AFFIRMED.

Appendix B1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALABAMA-TOMBIGBEE RIVERS COALITION, an Alabama nonprofit corporation, *et al.*,	)	
Plaintiffs,	)	CIVIL ACTION NO. CV-1-0194-VEH
vs.	)	
GALE NORTON, Secretary of the Department of Interior, *et al.*,	)	Filed November 14, 2005
Defendants.	)	

MEMORANDUM OPINION

This matter comes before the court on the cross-motions for summary judgment filed by the parties to this action (doc. 44, 49). The Complaint was filed on January 18, 2001 (doc. 1). The plaintiffs (hereafter "Coalition") filed this lawsuit under the citizen-suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(1), and the judicial-review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06, contending that the final rule listing the Alabama Sturgeon as an endangered species: (1) arose from an unlawful process; (2) was based on the flawed conclusion that the Alabama Sturgeon is a separate species from the Mississippi shovelnose sturgeon; (3) failed to designate critical habitat; (4) violated the Coalition members' Fifth Amendment right to Due

Process; and (5) was not within the powers granted to Congress by the Constitution under the Commerce Clause.

The Coalition filed a motion for summary judgment on April 16, 2002 (doc. 44). The defendants (hereafter "Government") filed a cross-motion for summary judgment on May 16, 2002 (doc. 49).

The district court denied the Coalition's motion for summary judgment and granted the Government's cross-motion for summary judgment holding that the Coalition lacked standing to bring this suit (doc. 58). No other arguments were addressed in the court's memorandum opinion entered with the order on these motions. The district court's decision was reversed and remanded on appeal (doc. 62) and the case was reassigned to the undersigned judge on June 28, 2004. The parties subsequently submitted to the court updates on the law contained in the cross-motions for summary judgment (docs. 83, 84, 85, 86). Oral arguments were heard by the court on September 21, 2005.

During oral arguments, the Coalition abandoned Count Two of the Complaint and consolidated Counts Three and Four. In addition, the Coalition asserted that the court's ruling on Counts Three and Four were inextricably linked to the court's ruling as to Count Five, that Count Eight is abandoned as the Coalition concedes that the FWS was within its authority under the ESA to list the Alabama Sturgeon as endangered, and that Count Nine is solely a remedy. The court will rule on the remaining Counts: One, Three, Four, Five, Six and Seven of the Coalition's Complaint.

Plaintiffs' Claims

Count One: The Fish and Wildlife Service (FWS) violated 16 U.S.C. § 1533(a)(3)(A) by

failing to concurrently designate a critical habitat with its listing decision.

Count Three: FWS violated 16 U.S.C. § 1533(a)(1) by failing to justify listing based solely on the five listing criteria provided in the ESA.

Count Four: FWS violated 16 U.S.C. § 1533(b)(1)(A) by failing to rely on the best scientific and commercial data available in making their listing decision.

Count Five: FWS violated the Administrative Procedure Act.

Count Six: Violations of the United States Constitution (Fifth Amendment Due Process).

Count Seven: Violations of the United States Constitution (Commerce Clause).

Facts[1]

The Alabama Sturgeon (*Scaphirhynchus suttkusi*) is a small freshwater fish that was historically found only in the Mobile River system of Alabama and Mississippi. *Final Rule to List the Alabama Sturgeon as Endangered*, 65 Fed. Reg.

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[1] "This court's review of plaintiffs' contentions shall be limited to the administrative record and undisputed facts set forth in the pleadings" (Order Denying Plaintiffs' Request to Engage in Discovery (docs. 28-29; *see also* Order Amending the Administrative Record (doc. 38), Order Denying Plaintiffs' Motion and Renewed Motion for a Hearing on Discovery (doc. 78)).

26438 (May 5, 2000) (hereafter "*Final Rule*"). This sturgeon is an elongate, slender fish growing to about 80 centimeters (cm) (31 inches (in)) in length. A mature fish weighs 1 to 2 kilograms (kg) (2 to 4 pounds (lb)). The head is broad and flattened shovel-like at the snout. The mouth is tubular and protrusive. There are four barbels (whisker-like appendages used to find prey) on the bottom of the snout, in front of the mouth. Bony plates cover the head, back, and sides. The body narrows abruptly to the rear, forming a narrow stalk between the body and tail. The upper lobe of the tail fin is elongated and ends in a long filament. *Id.* Although the sturgeon was once so common that it was captured commercially, it is now very rare and thought to occur only in small portions of the Alabama River channel in south Alabama and downstream to the mouth of the Tombigbee River.[2] *Id.* at 26439-40. This decline has been attributed to "over-fishing, loss and fragmentation of habitat due to historical navigation-related development, and water quality degradation." *Id.* at 26438.

The FWS initially considered whether to propose listing the sturgeon in 1980. *Review of Three Southeastern Fishes*, 45 Fed. Reg. 58171 (Sept. 2, 1980). The FWS issued a proposed rule to list the Alabama Sturgeon as endangered and to designate its critical habitat in 1993. *Proposed Endangered Status and Designation of Critical Habitat for the Alabama Sturgeon* (*Scaphirhynchus suttkusi*), 58 Fed. Reg. 33148 (June 15, 1993). During the public comment period on the proposed rule, businesses in Alabama became concerned about the economic impact of the listing and the Coalition formed to review the FWS's scientific and legal rationales for listing the Alabama Sturgeon. The Coalition sued the FWS under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2,

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[2] The last documented commercial harvest of Alabama Sturgeon occurred in 1898; however, the FWS believes that Alabama Sturgeon were caught for commercial purposes into the 1960's. *Final Rule*.

and obtained an injunction against the FWS to prevent the use of a report prepared by an improperly convened scientific committee. *Alabama-Tombigbee Rivers Coalition v. Dep't of Interior*, 26 F.3d 1103 (11th Cir. 1994) (affirming the district court's entry of permanent injunction). The FWS withdrew the proposed rule in 1994 because there was "insufficient information to justify listing a species that may no longer exist." *Withdrawal of Proposed Rule for Endangered Status and Critical Habitat for the Alabama Sturgeon*, 59 Fed. Reg. 64794 (December 15, 1994).

The capture of several Alabama Sturgeon confirmed the species's existence and the FWS issued a new proposed rule to list the fish as an endangered species in 1999.[3] *Proposed Rule to List the Alabama Sturgeon as Endangered*, 64 Fed. Reg. 14676 (March 26, 1999). After several extensions of the public comment period, in which the Coalition took part, the FWS published a final rule listing the Alabama Sturgeon as an endangered species, *Final Rule*, 65 Fed. Reg. 26438 (May 5, 2000). Following publication of the *Final Rule*, the Coalition filed suit against the Government.

Standard of Review for Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings or filings which

[3] The last known Alabama Sturgeon died in captivity in 2003.

it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, Rule 56(e) requires the non-moving party to go beyond the pleadings and, by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

The substantive law will identify which facts are material and which are irrelevant. *Chapman*, 229 F.3d at 1023; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *Chapman*, 229 F.3d at 1023; *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248; *Chapman*, 229 F.3d at 1023. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249.

The method used by the party moving for summary judgment to discharge its initial burden depends on whether that party bears the burden of proof on the issue at trial. *See Fitzpatrick*, 2 F.3d at 1115-17 (citing *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (*en banc*)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. *Fitzpatrick*, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial.

The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to affirmatively show the absence of any evidence in the record in support of a judgment for the non-moving party on the issue at question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not require evidence negating the non-movant's claim; it simply requires the movant to point out to the court that there is an absence of evidence to support the non-moving party's case. *Fitzpatrick*, 2 F.3d at 1115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point to evidence in the court record, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. *Lewis v. Casey*, 518 U.S. 343 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Appendix B8

Analysis

I. FWS did not violate the Commerce Clause in listing the Alabama Sturgeon as an endangered species pursuant to the ESA.

The Coalition asserts that the regulation of an intrastate, noncommercial fish by the FWS under the ESA violates the Commerce Clause based on the precedent articulated in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).[4] The Coalition argues that the FWS's application of the ESA in listing the Alabama Sturgeon as endangered violates the Commerce Clause. The Government's position is that the FWS was within the bounds of the Commerce Clause when it listed the Alabama Sturgeon as endangered in light of various Circuit Court decisions on point analyzed under the standards articulated in *Lopez* and *Morrison*.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court struck down a statute prohibiting the possession of a gun within 1,000 feet of a school as an invalid exercise of Congress' Commerce Power. *Id.* at 558. The Court reasoned that, despite the breadth of the Commerce Clause, there are "outer limits" to Congress's power. *Id.* at 557. Specifically, the Court held that Congress may only regulate activities which fall into one of the following three categories:

1. the use of the channels of interstate commerce;

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[4] During oral arguments heard by the court on September 21, 2005, the Government and the Coalition agreed that the Alabama Sturgeon is an intrastate, noncommercial fish.

2. instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; or

3. activities having a substantial relation to interstate commerce.[5]

Id. at 558-559.

The *Lopez* Court noted that the regulated activity (the possession of firearms near schools) fell into none of the three categories. The Court rejected the Government's argument that the act substantially relates to interstate commerce because, absent the law, the resulting higher crime rate near schools increases costs for the entire population, discourages interstate travel, obstructs the educational process, and accordingly obstructs productive citizenry. *Id.* at 563-564. Recognizing the far reaching implications of accepting such attenuated arguments, the Court stated:

> Under the theories that the Government presents in support of [the Act], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard

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[5] The *Lopez* Court established a four-prong test for determining whether regulated activities have a "substantial relation" to interstate commerce: (1) the regulation concerns commerce or economic activity; (2) the regulation contains a jurisdictional element that ensures, through a case-by-case inquiry that the regulated activity affects interstate commerce; (3) the legislative history contains Congressional findings regarding the effects upon interstate commerce; and (4) the proposed link between the [regulated] activity and its substantial impact is not overly attenuated. *United States v. Lopez*, 514 U.S. 549 (1995).

> pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564.

The Supreme Court also addressed the limits of Congress's Commerce Clause power in *United States v. Morrison*, 529 U.S. 598 (2000). The Court struck down legislation which provided a federal civil remedy for the victims of gender-motivated violence. Because the statute focused on gender-motivated violence "wherever it occurs," rather than violence directed at instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce the Court restricted its analysis to whether or not the activity regulated had a substantial relationship to interstate commerce and found that it did not. *Morrison*, 529 U.S. at 609.

As in *Lopez*, the Court in *Morrison* rejected the Government's argument that gender-motivated crime effects interstate commerce by deterring victims from traveling interstate, engaging in interstate business, transacting business, and ultimately diminishing national productivity. *Id.* at 613. The Court held that accepting such arguments might allow Congress to "use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority" and, if accepted, "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.* at 615.

In the present case, the Government offers several persuasive cases in support of its position that the FWS's listing of the Alabama Sturgeon as endangered fits neatly within the Commerce Clause framework established in *Lopez* and *Morrison*. In *GDF Realty Investments, Ltd. v. Norton*, the United States Court of Appeals for the Fifth Circuit held that

the application of the ESA's "take" provisions to six species of subterranean invertebrates (which are purely intrastate and decidedly non-commercial) was a valid exercise of the Commerce Clause. 326 F.3d 622, 640-41 (5th Cir. 2003), *reh'g denied*, 362 F.3d 286 (5th Cir. 2004). The Fifth Circuit held that the ESA is "an economic regulatory scheme" because its drafters "were concerned by the 'incalculable' value of the genetic heritage that might be lost absent regulation" and that the "regulation of intrastate takes of the [endangered] Cave Species is an essential part" of that regulatory scheme. *Id.* at 639-40. As such, the court concluded that "take" of these endangered cave species "may be aggregated with all other ESA takes" and that, considering the interdependence of species, such takes "do affect interstate commerce." *Id.* at 640-41. For the preceding reasons the Fifth Circuit held that "application of ESA's take provision to the [endangered] Cave Species is a constitutional exercise of the Commerce Clause power." *Id.*

The United States Court of Appeals for the District of Columbia Circuit reached the same conclusion in *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), finding that the application of the ESA to a purely intrastate and noncommercial species, the arroyo toad, was a valid exercise of the Commerce Clause. Similarly, the United States District Court for the District of Wyoming recently held that it is "well-settled that the ESA is a Constitutional exercise of Congressional authority under the Commerce Clause" and that the argument that Congress "is powerless to regulate gray wolves via the ESA on private or State lands because such regulation violates the Commerce Clause is meritless." *Wyoming v. United States Department of the Interior*, 360 F. Supp. 2d 1214, 1240, 1242 (D. Wyo. 2005).

It is worthy of note that both *Rancho Viejo* and *GDF Realty* were decided following the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United*

States v. Morrison, 529 U.S. 598 (2000). While neither *Lopez* nor *Morrison* addressed the ESA specifically, the Coalition relied heavily on these holdings in its briefs. The Fifth Circuit and the D.C. Circuit applied the standards set out in *Lopez* and *Morrison* to the ESA however, and concluded that the ESA's regulation of an intrastate, non-commercial species is constitutional under the Commerce Clause. The Coalition does not cite to a case in which a court reviewed the validity of the ESA's application to an intrastate, noncommercial species under Commerce Clause precedent and held that the ESA's application was unconstitutional.

In addition, the Government argues that the Supreme Court's recent decision in *Gonzales v. Raich* (the "medical marijuana" case) also provides further support for the conclusion that a valid exercise of the Commerce Clause can reach even purely intrastate, non-commercial activity.[6] *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). In *Gonzales*, the Supreme Court upheld a federal statute that prohibited the purely intrastate and non-commercial cultivation, possession, and use of "medical" marijuana. *Id.* at 2215. The Court held that Congress possessed the authority to bar these activities despite the fact that they were solely intrastate and non-commercial because such a prohibition was necessary to support a broader regulatory scheme intended to end interstate commerce in illegal drugs. *Id.* at 2208; *Id.* at 2216 ("Where necessary to make a regulation of interstate commerce effective,

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[6] The Supreme Court recently vacated *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004), and *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005), for "further consideration in light of *Gonzales v. Raich*, 125 U.S. 2938 (2005)." The Coalition partly relied on these cases in support of its contention that the 11th Circuit would most likely hold the application of the ESA to the Alabama Sturgeon to be impermissible under the Commerce Clause authority articulated in *Lopez* and *Morrison*. Neither *Maxwell* nor *Smith* dealt with the ESA.

Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.") (Scalia, J., concurring).

Moreover, the Court stressed that "[i]n assessing the scope of Congress's authority under the Commerce Clause, . . . the task before us is a modest one." *Id.* at 2208. The Court held that it was not required to determine whether the activities at issue, taken in the aggregate, would "substantially affect interstate commerce in fact," but rather "only whether a 'rational basis' exists for so concluding." *Id.* (emphasis added).

While the Supreme Court did not address the ESA specifically in *Gonzales*, it cited the similar "take" provision of the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a), as an example of a "rational (and commonly utilized) means of regulating commerce." *Id.* at 2211 n.36.

The Supreme Court denied *certiorari* in every case in which a court held that a challenge of the ESA's application to an intrastate, noncommercial species under the Commerce Clause was without merit. *See GDF Realty Investments, Limited v. Norton*, 326 F.3d 622, 640-41 (5th Cir. 2003), *cert. denied*, 125 S. Ct. 2898 (2005); *Rancho Viejo L.L.C. v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1506 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) (holding that the FWS's application of the ESA was within the bounds of the Commerce Clause as applied to the purely intrastate, noncommercial red wolf living on privately owned property in North Carolina); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (holding that the FWS's application of the ESA was within the bounds of the Commerce Clause as applied to two purely intrastate, noncommercial species of fly living on private property in California; noting also that over half of the species recognized

by FWS as endangered or threatened were purely intrastate species).

In consideration of the evidence and undisputed facts in the present case in light of *Lopez*, *Morrison*, *Gonzales*, and the Circuit Court decisions discussed herein, the court concludes that the FWS acted within the scope of the Commerce Clause in listing the Alabama Sturgeon as an endangered species pursuant to 16 U.S.C. § 1533. The listing of a purely intrastate, noncommercial species under the ESA does not violate the Commerce Clause because "the 'incalculable' value of the genetic heritage that might be lost absent regulation" would undoubtedly harm interstate commerce in a permanent and irreparable way. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640-41 (5th Cir. 2003) *reh'g denied*, 362 F.3d 286 (5th Cir. 2004). Congress is within its authority to impose regulations to prevent such harm.

II. The Coalition was afforded adequate Due Process by the FWS during the listing period for the Alabama Sturgeon.

The Coalition asserts that the Government failed to conduct a fair, objective, and impartial public comment period and hearing during the listing process of the Alabama Sturgeon and that the Government's attempts to influence an expert, Dr. Fain, who presented a report considered by the FWS during the listing period, violated the Coalition's Due Process rights under the Fifth Amendment of the U.S. Constitution.[7]

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[7] The Coalition asserts a Fifth Amendment take of its property rights in the Alabama and Tombigbee Rivers due to the listing of the Alabama Sturgeon. The court does not inquire into whether or not the Coalition does, in fact, possess a property right in the public waterways of Alabama. Solely for purposes of the Coalition's Fifth

(continued...)

A. The public comment periods and hearings conducted during the listing process for the Alabama Sturgeon did not deprive the Coalition of its Due Process rights under the Fifth Amendment.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In the present case, the evidence establishes that the general public was afforded the opportunity to be heard at every state of the decision-making process. During the time between the publication of the *Proposed Rule* on March 26, 1999 (64 Fed. Reg. 14676, AR 57) and the issuance of the *Final Rule* on May 5, 2000 (65 Fed. Reg. 26438, AR 1), no fewer than four separate comment periods were opened to encourage public comment and participation. Those periods ranged: from March 1999, to September 10, 1999 (AR35); from February 7, 2000, to March 8, 2000 (to receive comments on the Fain (2000) report) (AR 29); and from February 16, 2000 to March 17, 2000 (to receive comments on the Conservation Agreement and Strategy for the Alabama Sturgeon signed on February 9, 2000) (AR 27). Moreover, at the request of the Coalition, a public hearing on the proposal was held at the Montgomery Civic Center on June 24, 1999 (AR 37, 48). The Administrative Record details that the FWS went to great lengths to notify the public, to include the Coalition in the listing process, and to seek comments on the listing action. As a result, the FWS received approximately 4,000 written

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[7] (...continued)
Amendment Due Process Argument, the court's analysis is based on the assumption that some property right of the Coalition has been disturbed due to the listing of the Alabama Sturgeon.

comments and held a public hearing that was attended by approximately 1,000 people (AR 1 at 26442; *see also* AR 312-643).

The Coalition actively participated in the listing process through oral comments (AR 37) and written submissions (AR 314, 350, 352, 374, 410, 502, 638, 639, 640, 641, 642, and 643).

The FWS has the authority to list species, such as the Alabama Sturgeon, as endangered pursuant to the authority and guidelines of the ESA. Based on the information available in the Administrative Record and the undisputed facts set forth in the parties' pleadings, the court concludes that the FWS held meaningful public comment forums during the listing period for the Alabama Sturgeon and that the FWS reviewed and considered the comments received. The Coalition's participation in this process is documented by the FWS in the *Final Rule*. The Coalition actively participated in the listing process and that process afforded the Coalition a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). If a property right of the Coalition was taken as a result of the listing decision, it was not done absent adequate and meaningful Due Process.

B. Nothing in the Administrative Record or in the undisputed facts presented in the pleadings suggests that the FWS interfered with Dr. Fain's research.

The Coalition argues that its Due Process rights were violated because the FWS improperly interfered with or improperly influenced the expert report(s) submitted by Dr. Fain during the listing process of the Alabama Sturgeon; however, the Coalition does not cite to any admissible evidence

to substantiate this claim.[8] The coalition moved first for summary judgment on this issue. The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings or filings which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Government combats this lack of evidence by presenting evidence contrary to the Coalition's position. The FWS specifically addresses this accusation and denies the Coalition's allegation in detail in the text of the *Final Rule.* 65 Fed. Reg. 26438, AR 29. The Fain (2000) report was considered and weighed by the FWS during the listing process and was discussed at length in the *Final Rule. Id.* The Coalition does not meet its evidentiary burden on this issue for summary judgment and cannot prevail.

III. The Coalition's claims under the Administrative Procedure Act (APA) requesting that the court substitute its judgment for the judgment of the FWS fail as a matter of law.

A. The FWS did not violate the APA, when listing the Alabama Sturgeon as endangered.

Judicial review of administrative actions under the ESA, including the decision currently at issue, is governed by section 706 of the APA, 5 U.S.C. § 706. *Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy*, 898 F.2d 1410, 1413 (9th Cir. 1990). Under the APA an agency determination may be set aside only

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[8] The Coalition cites to documents (mostly in the form of newspaper articles and e-mails) in support of its contention that the FWS improperly interfered with Dr. Fain's research. These documents have been excluded from evidence by the court and are not considered for the purpose of the court's analysis of the pending cross-motions for summary judgment (*See* docs. 28, 29, 38, 78).

it if is arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(A). This standard is a narrow one whereby "[t]he court is not empowered to substitute its judgment for that of the agency." *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1246 (11th Cir. 1996) citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U,.S. 402, 416 (1971) (*See also American Petroleum Institute v. EPA*, 858 F.2d 261, 264 (5th Cir. 1988) citing *Baltimore Gas and Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87 (1983)). The court should not examine the evidence and determine whether it would have decided an issue differently; instead, it "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1538-40 (11th Cir. 1990); *see also Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989). "The relevant inquiry is whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Pyramid Lake Paiute Tribe*, 898 F.2d 1410, 1414 (internal citations omitted); *see also United States v. Guthrie*, 50 F.3d 936, 946 (11th Cir. 1995) ("This circuit is 'highly deferential' to an agency's consideration of the factors relevant to its decision.") (citing *Hussion v. Madigan*, 950 F.2d 1546, 1533 (11th Cir. 1992)).

This deferential standard of review "is especially appropriate where, as here, the challenged decision implicates substantial agency expertise." *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993) (citations omitted). The court is to "defer to the agency's interpretation of equivocal evidence, so long as it is reasonable." *Central Arizona Water Conservation Dist. v. U.S. Environmental Protection Agency*, 990 F.2d 1531, 1539 (9th Cir. 1993). Deference to the agency

is "greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology." *State of Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988).

Moreover, often "the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *Fisherman's Dock Coop. v. Brown*, 75 F.3d 164, 172 (4th Cir. 1996) (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983)). In these situations, the agency must be free to make the "decision without pretending that that decision reflected some degree of rational perfection beyond what the inherent uncertainties of the available data permitted." *Id.* Accordingly, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378.

When a question of statutory construction is raised courts must show deference to the interpretation given by the agency in the exercise of its delegated authority. *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2171-2172 (2001); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980); *American Wildlands v. Browner*, 260 F.3d 1192, 1196 (10th Cir. 2001) (applying *Chevron* deference to EPA decisions to approve state water quality standards). Even if a statute is susceptible to more than one interpretation, a court must accept the interpretation chosen by the agency if it is "reasonable." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). An agency's interpretation of its own regulations is entitled to even greater deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Courts give "controlling weight" to the agency's interpretation "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Praxair, Inc. v. Fla. Power & Light Co.*,

64 F.3d 609, 613 (11th Cir. 1995); *Fla. Gas Transmission Co. v. FERC*, 741 F.2d 1307, 1309 (11th Cir. 1984).

Finally, judicial review of an agency's determination must be based on the administrative record that was before the agency at the time the decision was made. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *United States v. Guthrie*, 50 F.3d 936, 944 (11th Cir. 1995). Accordingly, the scope of review in this matter requires this court to focus on the contents of the administrative record to determine if that record supports the decision. Absent narrowly-defined exceptional circumstances, extra-record materials that were not before the agency may not be used to supplement the administrative record. *Preserve Endangered Areas of Cobb's History, Inc. ("P.E.A.C.H.") v. United States Army Corps of Eng'rs.*, 87 F.3d 1242, 1246 (11th Cir. 1996). In the present case, the court ruled that the evidence to be considered will come solely from the administrative record as amended by the court and the undisputed facts as set forth in the pleadings (*See* docs. 28, 29, 38, 78). The court did not permit additional discovery in this case (doc. 29).

As such, the court holds that there is nothing in either the Administrative Record or in the parties' undisputed facts that demonstrates that the FWS listing decision process or the listing decision itself is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The remainder of the Coalition's claims will be analyzed according to this holding.

B. The FWS was within its authority to base its listing of the Alabama Sturgeon on two of the mandatory five listing criteria found in 16 U.S.C. § 1533(a)(1).

"The Secretary shall by regulation promulgated . . . determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence."

16 U.S.C.A. § 1533(a)(1) (emphasis added).

The FWS listed the Alabama Sturgeon as endangered based on subsections (A) and (E) above. *Final Rule*. The Coalition argues that the FWS's listing on these two criteria alone fails because the threats to the Alabama Sturgeon are not current threats based on the information found within the Administrative Record. This contention fails on two fronts. First, the court will not substitute its judgment for that of the FWS based on the evidence currently before the court because the FWS's judgment was not arbitrary, capricious, or an abuse of discretion. *Hussion v. Madigan*, 950 F.2d 1546, 1553 (11th Cir. 1992). Second, the court should grant great deference to an agency's reasonable determination of a statute. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

In the present case, the FWS determined that 16 U.S.C. § 1533(a)(1) afforded it the choice to list the Alabama Sturgeon

as endangered under two of the five possible listing criteria. This is a reasonable reading of 16 U.S.C. § 1533(a)(1). The Coalition does not put forth any case law or alternate theory of statutory interpretation that contradicts the reasonableness of the FWS's determination. Consequently, the court will not disturb the FWS's reasonable interpretation of 16 U.S.C. § 1533(a)(1).

C. The court will not inquire into the nature and quality of the scientific and commercial data used by the FSA during the listing process for the Alabama Sturgeon.

The Coalition asserts that the FWS violated 16 U.S.C. § 1533(b)(1)(A) by failing to rely on the best scientific and commercial data available in listing the Alabama Sturgeon as endangered. Analysis of this claim is governed by the APA and *U.S. v. Guthrie*, 50 F.3d 936 (11th Cir. 1995). Deference to the agency is "greatest when reviewing technical matters within its area of expertise, particularly its choice of scientific data and statistical methodology." *State of Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988). It is not for this court to decide whether or not the FWS used the best scientific and commercial data available in reaching its listing decision; rather the court must consider whether or not the FWS reviewed the data before it in a way that is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *U.S. v. Guthrie*, 50 F.3d 936, 945 (11th Cir. 1995) (citing 5 U.S.C.A. § 706(2)(A)). The arbitrary and capricious standard articulated in *Guthrie* applies to the FWS's determination that the Alabama Sturgeon is considered to be a valid and separate species. *Id.*

Upon review of the sources and studies cited in the *Final Rule*, the court concludes that the FWS did not act outside of the scope of *Guthrie* when determining that the Alabama

Sturgeon is indeed a valid and separate species from the Mississippi Shovelnose Sturgeon.

In the *Final Rule*, the FWS acknowledges that "there is some disagreement concerning the [Alabama] sturgeon's taxonomic status." 65 FR 26438, 26439 (2000). Despite this "disagreement" the FWS supports its finding in that the Alabama Sturgeon is recognized "as a species by several recent unpublished studies (Campton et al. 1995, 1999, in press; Genetic Analyses, Inc. 1994, 1995; Mayden et al. 1999) . . . [and] is nationally and internationally recognized as a valid species." *Id.* The FWS cites to nine published studies that recognize the Alabama Sturgeon as a separate and valid species. *Id.* at 26443. Several of these published studies discuss the differences between the Alabama Sturgeon and the Mississippi Shovelnose Sturgeon. These references reflect the scientific history behind the FWS's conclusion that the Alabama Sturgeon is a separate and valid species. Based on the court's review of the record, the FWS did not act arbitrarily or capriciously in determining that the Alabama Sturgeon is a separate and valid species for purposes of listing it as an endangered species pursuant to 16 U.S.C. § 1533.

IV. FWS violated 16 U.S.C. § 1533(a)(3)(A) by failing to concurrently designate "critical habitat" with its listing decision.

During oral arguments heard by the court on September 21, 2005, the Government conceded that it was in violation of 16 U.S.C. § 1533(a)(3)(A) due to its failure to designate a critical habitat for the Alabama Sturgeon contemporaneously with its listing decision or within the maximum two year extension limitation allowed by the statute. Designation of a critical habitat by the FWS is a "mandatory, non-discretionary duty unambiguously imposed by the ESA" and "the Administrative Procedure Act requires courts to compel agency

action unlawfully withheld."[9] *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1181 (10th Cir. 1999) (*See also Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed"). Thus, the court is compelled to remedy the FWS's failure to comply with 16 U.S.C. § 1533(a)(3)(A).

The Coalition proposes that the court should impose the extraordinary and unprecedented remedy of vacating the listing decision in its entirety thus causing the FWS to begin the listing process of the Alabama Sturgeon anew. The Coalition cannot cite to an instance where a court has ordered this remedy nor is the court convinced that this course of action would correct the FWS's failure to comply with the ESA in the most prudent, just, and equitable way. The Coalition's proposed remedy would require great a expense of money, time, and resources should the FWS decide to re-list the Alabama Sturgeon.

The court is not persuaded that the Coalition's proposed remedy is appropriate and finds support for a less drastic and less costly remedy that would bring the FWS into compliance with the ESA. In *Kern County Farm Bureau, et al. v. Anne Badgley, et al.*, the FWS violated 16 U.S.C. § 1533(a)(3)(A) by failing to concurrently designate a critical habitat with its listing decision for the Buena Vista Lake Shrew and continued to violate the statute by failing to designate a critical habitat for the Shrew for greater than five years following the publication of the listing decision. Memorandum Opinion and Order at 27, *Kern County Farm Bureau, et al. v. Anne Badgley, et al.*,

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[9] In *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1180 (10th Cir. 1999) the Court of Appeals for the 10th Circuit directed a district court to order the FWS to designate a critical habitat for the endangered Rio Grande silvery minnow "as soon as possible" due to the FWS's violation of 16 U.S.C. § 1533.

No. 02-5376 (E.D.C.A. 2004). As in the present case, the FWS in *Kern County* conceded that it was in violation of 16 U.S.C. § 1533(a)(3)(A); in addition, in both *Kern County* and the present case, the FWS stated to the court that it would not designate a critical habitat for the listed species absent a court order. *Id.* at 29-30. The court in *Kern County* found "it reasonable to require the Service to publish a proposed critical habitat determination . . . no later than one year" from the date of the order. *Id.* at 30.

In keeping with the holding in *Kern County*, this court holds that the appropriate remedy for the FWS's failure to comply with 16 U.S.C. 1533(a)(3)(A) is for the court to order the FWS to publish a proposed critical habitat determination for the Alabama Sturgeon no later than six months following the issuance of the order and a final determination no later than one year following the issuance of the order.

Conclusion

For the reasons stated, the Coalition's motion for summary judgment is **GRANTED** in part and **DENIED** in part. The Government's motion for summary judgment is **GRANTED** in part and **DENIED** in part. A separate order will be entered consistent with this opinion.

DONE this 14th day of November, 2005.

/s/ Virginia Emerson Hopkins
VIRGINIA EMERSON HOPKINS
United States District Judge

Appendix C1

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 02-14423

ALABAMA-TOMBIGBEE RIVERS COALITION, an Alabama nonprofit corporation, PARKER TOWING CO., INC., an Alabama corporation, CHARLES A. HAUN, an individual,

Plaintiffs-Appellants,

v.

GALE NORTON, Secretary of the United States Department of the Interior, SAM HAMILTON, Regional Director of the United States Fish and Wildlife Service, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, an agency of the United States Department of the Interior, STEVE WILLIAMS, Director of Fish and Wildlife Service,

Defendants-Appellees.

Filed July 23, 2003.

Before EDMONDSON, Chief Judge, CARNES, Circuit Judge, and STORY,* District Judge.

*Honorable Richard W. Story, United States District Judge for the Northern District of Georgia, sitting by designation.

Appendix C2

STORY, District Judge:

This case involves a business organization's standing to challenge a decision by the Secretary of the Interior to list the Alabama sturgeon as an endangered species pursuant to the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-44. The district court held that Appellants lacked standing and entered summary judgment for Appellees. We reverse and remand.

Appellant Alabama-Tombigbee Rivers Coalition is an Alabama non-profit corporation consisting of sixteen industries, agencies, and associations that rely upon Alabama waterways as integral components of their businesses. Appellant Parker Towing Company ("Parker Towing") is an Alabama corporation and member of the Coalition that uses the Alabama waterways in its towing and barge business. Appellant Charles A. Haun is the Vice President of Parker Towing; he also uses the waterways for recreation.[1] The Coalition filed this suit against Gale Norton, Secretary of the U.S. Department of Interior; Steve Williams, Director of the U.S. Fish and Wildlife Service ("FWS"); Sam Hamilton, Regional Director of the FWS; the U.S. Department of the Interior; and the FWS,[2] alleging that the Government unlawfully listed the Alabama sturgeon as an endangered species.[3]

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[1] We refer to Plaintiffs-Appellants collectively as "the Coalition."

[2] We refer to Defendants-Appellees collectively as "the Government."

[3] Appellants originally sued Bruce Babbitt, then-Secretary of the U.S. Department of the Interior, and Jamie Rappaport Clark, then-director of the U.S. Fish and Wildlife Service; following a change in the U.S. Presidential administration, these parties' successors were automatically substituted as defendants. *See* Fed.R.Civ.P. 25(d)(1).

Appendix C3

I. Background

A. The Endangered Species Act

The ESA "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" and provided "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 2294, 57 L. Ed. 2d 117 (1978); *see also* 16 U.S.C. § 1531(b). The ESA requires the Secretary of the Interior to promulgate regulations listing any species that is threatened or endangered. 16 U.S.C. § 1533. Once a species is listed, various prohibitions attempt to ensure the survival and recovery of that species. *See, e.g.*, § 1536(a)(2) (federal agencies' duty to avoid jeopardizing listed species); § 1538(a) (prohibitions against taking of listed species). The statute imposes the obligation on federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." § 1536(a)(2); *Bennett v. Spear*, 520 U.S. 154, 154, 117 S. Ct. 1154, 1159, 137 L. Ed. 2d 281 (1997). Thus, if an agency determines that its proposed action may adversely affect a listed species or critical habitat, it must formally consult with the FWS or the National Marine Fisheries Service ("NMFS"). § 1536(a)(2); 50 C.F.R. § 402.14 (2002). Additionally, the Regional Director of the FWS or the Assistant Administrator for the National Oceanic and Atmospheric Administration ("NOAA") may request the agency to engage in consultation. 50 C.F.R. § 402.14(a). Finally, consultation shall occur "at the request of, and in cooperation with," a prospective permit or license applicant "if the applicant has reason to believe" that a listed species "may be present in the area affected by his project

and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

An agency "action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." 50 C.F.R. § 402.02. This definition expressly includes the granting of permits and licenses, although the consultation requirement is limited to those actions that require "discretionary Federal involvement or control." *Id.*; 50 C.F.R. § 402.03; *see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073-75 (9th Cir. 1996) (concluding FWS' advisory activity did not involve discretion so as to trigger consultation requirement). Applicants for federal permits may participate in the consultation process, but they are not required to do so. *See* 50 C.F.R. § 402.14(d) ("The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.").

Following the consultation process, the FWS must provide a written statement of its opinion detailing how the proposed action will affect the species or its habitat, and suggesting alternatives if it appears the proposed action would jeopardize the species or adversely modify its habitat. 16 U.S.C. § 1536(b)(3)(A). An "incidental take" permit may be issued if the suggested alternatives will minimize injury to the species. § 1536(b)(4). These alternatives may become conditions for applicants to obtain permits or licenses. *Id.*; *see, e.g.*, *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1240-41 (11th Cir. 1998) (summarizing mitigation measures required as condition of incidental take permit); *Envtl. Coalition of Broward County, Inc. v. Myers*, 831 F.2d 984, 987 (11th Cir. 1987) (upholding Corps' issuance of dredging permit following consultation and noting Corps had imposed eight additional conditions to minimize possible injury to endangered manatee).

Appendix C5

B. Factual and Procedural Background

1. The Alabama sturgeon

The Alabama sturgeon (*Scaphirhynchus suttkusi*) is a small freshwater fish that was historically found only in the Mobile River system of Alabama and Mississippi. Final Rule to List the Alabama Sturgeon as Endangered, 65 Fed. Reg. 26,438 (May 5, 2000) [hereinafter, *Final Rule*].

> This sturgeon is an elongate, slender fish growing to about 80 centimeters (cm) (31 inches (in)) in length. A mature fish weighs 1 to 2 kilograms (kg) (2 to 4 pounds (lb)). The head is broad and flattened shovel-like at the snout. The mouth is tubular and protrusive. There are four barbels (whisker-like appendages used to find prey) on the bottom of the snout, in front of the mouth. Bony plates cover the head, back, and sides. The body narrows abruptly to the rear, forming a narrow stalk between the body and tail. The upper lobe of the tail fin is elongated and ends in a long filament.

Id. Although the sturgeon was once so common that it was captured commercially, it is now very rare and thought to occur only in small portions of the Alabama River channel in south Alabama, downstream to the mouth of the Tombigbee River. *Id.* at 26,439-40. This decline has been attributed to "over-fishing, loss and fragmentation of habitat due to historical navigation-related development, and water quality degradation." *Id.* at 26,438.

The FWS initially considered whether to propose listing the sturgeon in 1980. Review of Three Southeastern Fishes, 45 Fed. Reg. 58,171 (Sept. 2, 1980). The FWS issued a proposed rule to list the Alabama sturgeon as endangered and to

designate critical habitat in 1993. Proposed Endangered Status and Designation of Critical Habitat for the Alabama Sturgeon (Scaphirhynchus suttkusi), 58 Fed. Reg. 33,148 (June 15, 1993). During the public comment period on the proposed rule, businesses in Alabama became concerned about the economic impact of the listing, and the Coalition was formed to review the FWS' scientific and legal rationales for listing the sturgeon. The Coalition sued the FWS under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and obtained an injunction against the FWS preventing it from using a report prepared by a scientific committee that had been improperly convened. *See generally Alabama-Tombigbee Rivers Coalition v. Dep't of Interior*, 26 F.3d 1103 (11th Cir. 1994) (setting forth history and affirming district court's entry of permanent injunction) [hereinafter *Coalition I*]. The FWS withdrew the proposed rule in 1994 because there was "insufficient information to justify listing a species that may no longer exist." Withdrawal of Proposed Rule for Endangered Status and Critical Habitat for the Alabama Sturgeon, 59 Fed. Reg. 64,794 (December 15, 1994).

The Coalition remained actively involved in scientific studies and conservation efforts for the Alabama sturgeon even after the FWS withdrew its proposed listing. In 1996, the Coalition initiated discussions between the FWS, the Army Corps of Engineers (the "Corps"), the State of Alabama, and members of Alabama's congressional delegation that led to a Voluntary Conservation Plan funded by Congress and led by the state. This plan consisted of a captive breeding program that was ultimately unsuccessful. Nevertheless, the Coalition continued to participate in and fund various studies about the species.[4] In 2000, the Coalition again worked with federal and

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[4] Much of this research was directed to determining whether the Alabama sturgeon is a separate species from the Mississippi

(continued...)

state interests to convert the Voluntary Conservation Plan into a ten-year, eight-million-dollar, formal Conservation Agreement designed to recover the Alabama sturgeon.

Meanwhile, the capture of several Alabama sturgeon confirmed the species' existence, and the FWS issued another proposed rule to list the fish as an endangered species in 1999. Proposed Rule to List the Alabama Sturgeon as Endangered, 64 Fed. Reg. 14,676 (Mar. 26, 1999). After several extensions of the public comment period, the FWS published a final rule listing the Alabama sturgeon as an endangered species. Final Rule, 65 Fed. Reg. 26,438.

2. District court proceedings

The Coalition filed this lawsuit under the citizen-suit provision of the ESA, § 1540(g)(1), and the judicial-review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06, seeking declaratory and injunctive relief and contending that the final rule: arose from an unlawful process; was based on the flawed conclusion that the Alabama sturgeon is a separate species from the Mississippi shovelnose sturgeon; failed to designate critical habitat; violated the Coalition members' Fifth Amendment right to due process; and was not within the powers granted to Congress by the Constitution.

The parties filed cross-motions for summary judgment; the Government argued that the Coalition lacked standing. In response, the Coalition submitted four affidavits. First, John D.

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[4] (...continued)
shovelnose sturgeon. The FWS has concluded that the two are separate species—a conclusion challenged by the Coalition in this lawsuit.

Grogan, the Environmental Compliance Manager of Alabama Power Company, which is a member of the Coalition, described the Company's operation of hydroelectric power generating units. Subsequent to the listing of the Alabama sturgeon, the NMFS sought to intervene in Alabama Power's application to amend its license for the Holt Project on the Black-Warrior Tombigbee Waterway. In its Motion to Intervene, the NMFS stated that the Mobile River Basin supports populations of various migrating fish species, including the Alabama sturgeon, and noted that the Holt Project is currently a partial barrier for fish migrations. The NMFS requested that the Federal Energy Regulatory Commission ("FERC") not issue a license amendment until Alabama Power addressed water quality concerns and implemented mitigation measures. Mr. Grogan averred that Alabama Power expended substantial resources in responding to the Motion to Intervene; moreover, Alabama Power routinely needs to amend or renew its licenses. Thus, he submitted that the company will continue to be injured because the listing provides the NMFS and the FWS the opportunity to seek to change Alabama Power's operation of its hydropower generation units and management of reservoirs. As Mr. Grogan explained, Alabama Power will likely be required to make these changes, or will otherwise expend significant resources opposing them.

Second, Charles Haun, a named plaintiff and the Executive Vice President of Parker Towing, averred that Parking Towing is a full-service marine transportation company that conducts its business in the waterways of Alabama. As he represented, maintenance activities such as dredging are essential to Parker Towing's operations. However, he explained that the FWS' decision to list the Alabama sturgeon as a separate species has caused a "direct, substantial, specific, and present injury" to Parker Towing and the company's ability to timely deliver the products it transports. Because of the consultation requirement, he submitted that there will be delays and conditions imposed

on Parker Towing with respect to permits and authorizations for maintenance dredging, including the removal of rock ledges within waterways, which will cause "significant adverse economic consequences for Parker Towing."[5] Mr. Haun also noted that changes in the operations of locks and dams such as those proposed in the NMFS' Motion to Intervene will directly interfere with Parker Towing's operations. Finally, Mr. Haun further averred that he is personally interested in the recovery of the sturgeon because he spends time boating in areas of the Warrior River that are likely habitats for the sturgeon.

The third affiant, Ralph O. Clemens, Jr., is the President of the Coalition. He submitted that the listing of the Alabama sturgeon has created the opportunity for the FWS and NMFS to intervene, require consultation, or otherwise participate in various permitting and licensing issues involving members of the Coalition. Mr. Clemens further described the history of the Coalition's involvement in developing the Conservation Agreement and noted that as a result of the listing, the Coalition is forbidden from participating in sturgeon repopulation efforts utilizing the Mississippi shovelnose sturgeon.

Richard J. Oates, the final affiant, is the Executive Director of the Alabama Pulp and Paper Council, which is a member of the Coalition. As he described, the decision to list the Alabama sturgeon has caused "direct, substantial, specific, and present injuries to the Council . . . ." Like Mr. Clemens, Mr. Oates pointed to the possibility of intervention in permitting issues and the consultation requirement as the impetuses for "adverse

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[5] The *Final Rule* noted that "consultation will be required prior to the commencement of any rock shelf removal project within or adjacent to potential Alabama sturgeon habitat." 65 Fed. Reg. at 26,459. However, it explained that such consultation could be conducted so as to avoid delays in maintenance dredging activities. *Id.*

interferences with the operations of members of the Council and the Coalition." As an example, he noted that the FWS commented on a member's application for maintenance dredging in light of a threatened species' presence and the proposed listing of the Alabama sturgeon. In its comment letter, the FWS stated that if various management procedures were not put in place, ESA consultation would be required. Mr. Oates further stated that because of the listing of the Alabama sturgeon, members of the Council and Coalition are "having to modify their facilities or alter their operations, . . . or otherwise spend significant resources opposing such modifications or alterations." Indeed, he submitted that "[t]he mere fact that consultation is now required . . . causes members of the Council and the Coalition injury in the form of planning, expenses, costly studies, and project delays."

The district court held that the Coalition had not met its summary judgment burden with respect to standing. The court rejected the Coalition's economic standing argument, noting first that the Coalition's brief in support of its own motion for summary judgment stated that the listing decision "will not impact economic or interstate activities."[6] Although the Coalition submitted that the opportunity of FWS to intervene would cause planning expenses, costly studies, and project delays, the district court pointed out that the Coalition had provided no evidence of actual expenses, studies, or delays. Emphasizing the Coalition's recognition that the findings set forth in the final rule noted there would be no adverse economic impact, the court reasoned that a bare opportunity for FWS to intervene was inadequate to establish injury in fact.

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[6] The Coalition made this argument in support of its contention that the listing was not within the scope of authority granted by the Commerce Clause. For further discussion, *see infra* note 9.

The district court further explained that "businesses operating along Alabama waterways may be subject to consultation with, or 'interference' from, Federal agencies under numerous environmental statutes, not just the ESA." Moreover, the district court recognized that the Alabama sturgeon is not the only endangered or threatened species in these waterways. Based on these circumstances, the district court concluded that the "conjectural threat of the 'opportunity' for economic injury" was insufficient to establish standing. Addressing NMFS' Motion to Intervene as a particular showing of injury, the court first noted "that there is evidence that the Alabama sturgeon does not exist in the waters surrounding the Holt Lock and Dam Project." Second, the NMFS sought to intervene in Alabama Power's license amendment proceeding pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-66, although it listed numerous statutes, including the ESA, as additional authority for intervention. Finally, the Motion to Intervene listed five species of diadromous fish, three of which—the Alabama sturgeon, the Gulf sturgeon, and the Alabama shad—are threatened or endangered species. Because numerous statutes and species already enabled the Government to intervene or consult, the district court concluded that the costs expended by Alabama Power were not fairly traceable to the listing decision and would not be remedied by a judgment declaring the listing unlawful and void.

Turning next to the dredging activities and FWS comment letter, the district court emphasized that during the listing process and in the final rule, the Government found that—contrary to the assertions in the letter—the listing of the Alabama sturgeon would not impact navigation and channel maintenance. In light of that finding, the court reasoned that any interference with dredging activities prior to the listing did not support a reasonable inference that FWS would interfere with future dredging activities. Further, the court held that any injury would not be fairly traceable to the listing because, as the

FWS letter reflected, the threatened Gulf sturgeon was also found in the waters covered by the application. Thus, de-listing the Alabama sturgeon would not necessarily remedy the injuries incurred as a result of the Government's interference.

The district court entered summary judgment for the Government, holding that the Coalition, Parker Towing, and Mr. Haun lacked constitutional standing.[7] On appeal, the Coalition asserts several bases for standing. First, the Coalition argues that the district court erred by failing to apply issue preclusion stemming from the standing decisions explicit or implicit in *Coalition I*. Second, the Coalition asserts numerous grounds for constitutional standing in this case: (1) economic standing; (2) environmental, scientific, recreational, and aesthetic standing; and (3) procedural standing. Because we hold that the Coalition has economic standing, we need not consider its other arguments.

II. Discussion—Article III Standing

Article III of the Constitution confines the reach of federal jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2. This limitation "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750,

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[7] The district court further rejected standing on the basis of the Coalition's sturgeon recovery efforts and Mr. Haun's recreational activities. Because we hold that the Coalition has economic standing, we do not consider whether the recovery efforts or recreational activities provide independent bases for standing. *See Planned Parenthood of the Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1465-66 n.2 (11th Cir. 1 991) (noting that when one plaintiff has standing to bring all claims in an action, the court need not inquire into the standing of other plaintiffs).

104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1990) (describing how standing interfaces with separation of powers and breadth of judicial power). These values are reflected in the three required elements for constitutional standing: (1) "an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent', not 'conjectural' or 'hypothetical;'" (2) "causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant;" and (3) "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04, 118 S. Ct. 1003, 1016-17, 140 L. Ed. 2d 210 (1998); *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 120 S. Ct. 1858, 1861-62, 146 L. Ed. 2d 836 (2000); *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003).[8] "When the attack on standing occurs via a motion for summary

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[8] Whether a plaintiff has standing "'involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise.'" *Bennett*, 520 U.S. at 162, 117 S. Ct. at 1161 (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975)). The Government has not challenged the Coalition's standing on prudential grounds. *See id.* at 162-66, 117 S. Ct. 1154, 117 S. Ct. at 1161-63 (reversing Court of Appeal's determination that plaintiffs seeking to prevent application of environmental restrictions and protect their business lacked standing under the zone-of-interests test to bring claims under the ESA citizen-suit provision). Nor has the Government challenged the Coalition's standing as a membership organization, which requires three additional elements: "(1) its members must otherwise have standing to sue in their own right; (2) the interests it seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested must require the participation of the association's individual members." *Region 8 Forest Serv. Timber Purchasers v. Alcock*, 993 F.2d 800, 805 n.3 (11th Cir. 1993).

judgment, the plaintiffs can no longer rest on their allegations, but must set forth by affidavit or other evidence specific facts which for the purpose of summary judgment will be taken as true." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993) (internal quotations omitted); *see also Lujan*, 504 U.S. at 561, 112 S. Ct. at 2137. Whether a plaintiff has standing to bring a suit is a legal issue that we review de novo. *Region 8*, 993 F.2d at 806.

A. Injury in Fact

The parties do not dispute that harm to economic interests presents a cognizable injury for purposes of standing. *Bennett*, 520 U.S. at 167-68, 117 S. Ct. at 1163-64; *see also Clinton v. City of New York*, 524 U.S. 417, 433, 118 S. Ct. 2091, 2100, 141 L. Ed. 2d 393 (1998) (recognizing probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy Article III injury-in-fact requirement); *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001) (holding adult entertainment business's alleged financial loss as result of city ordinance was sufficient to establish injury in fact); *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993) ("While the project is not yet completed, and hence specific proof of competitive injury is not possible, it could hardly be thought that administrative action likely to cause harm cannot be challenged until it is too late." (internal quotations omitted)); *cf. Lujan*, 504 U.S. at 562-63, 112 S. Ct. at 2137 ("the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing"). The Government contends, however, that the Coalition has not produced evidence showing that the economic injuries of its members are sufficiently concrete and imminent to confer standing here.

The "injury in fact" element of Article III standing does not require a plaintiff to wait until an injury occurs to bring suit. *31*

Foster Children, 329 F.3d at 1265. However, the injury must be imminent—not abstract, hypothetical, or conjectural. *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136. Imminence, while an "elastic concept," requires that "the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* at 565 n.2, 112 S. Ct. at 2138-39 n.2. In *31 Foster Children*, we elaborated on the concept of immediacy for purposes of considering allegations of future injuries. 329 F.3d at 1266. There, foster children sued the administrators of Florida's foster care system, seeking prospective relief with respect to, *inter alia*, their claims for the substantive due process rights to safe care and prompt services and First, Ninth, and Fourteenth Amendment rights to family associations. *Id.* at 1261-62. The administrators argued that most of the plaintiffs failed to allege either a palpable risk of injury or imminent harm; instead, the defendants contended, the plaintiffs complained mainly of past harms. *Id.* at 1265. We concluded that the plaintiffs in the defendants' physical custody had standing with respect to the substantive due process claims, as did the plaintiffs who were in the defendants' physical custody with siblings for the associational claims. *Id.* at 1266. We reasoned that the plaintiffs were in the defendants' care involuntarily and could not avoid exposure to the challenged conduct. *Id.* The alleged future injuries were similar to an injurious policy, rather than being conjectural injuries whose occurrences were premised on a past random act. *Id.* Indeed, we concluded that the "alleged pattern and practice in this case presents a substantial likelihood that the alleged injury will occur." *Id.*

Similarly here, the Coalition is operating against the backdrop of a continuing policy that was triggered by the listing and is effectuated by the machinery of the ESA. While the Coalition's evidence of past events such as the FWS' intervention and the comment letter might by itself be insufficient to establish standing for prospective relief, in this

context the evidence illustrates what is apparent from a review of the ESA: the listing has injured the Coalition's members and will continue to do so. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S. Ct. 1660, 1667, 75 L. Ed. 2d 675 (1983) (reasoning plaintiff lacked standing to pursue injunctive relief stemming from one-time traffic stop and choking incident). Messrs. Grogan, Haun, and Oates have all indicated that Coalition members operate their businesses subject to federal licenses and permits; the Government does not dispute that portions of the members' licensed or permitted activities take place in historical Alabama sturgeon habitat. It is reasonable to infer from the Coalition's evidence that its members have settled expectations with respect to the viability of their businesses—expectations that the members intend to guard not in the speculative future, but constantly. The listing adds another layer of concrete economic considerations that may be in tension with the members' pre-listing assumptions. Indeed, all of the affiants averred that Coalition members are now modifying their facilities, altering their operations, or expending resources to oppose such modifications; further, they stated that the consultation requirement is causing Coalition members injury in the form of planning, studies, and delays. The Coalition need not present "detailed descriptions" of actual expenses, as the district court would have required. *Lujan*, 504 U.S. at 565 n.2, 112 S. Ct. at 2138 n.2 (internal quotations omitted). Where standing is premised on future injury, "its imminence (though not its precise extent) must be established." *Id.* (emphasis added).[9] We therefore conclude that the Coalition

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[9] We further reject the notion that the Coalition's Commerce Clause argument, which emphasized the FWS' conclusions that the listing would not have a significant economic impact, constituted a judicial admission. Legal arguments are distinguishable from judicial admissions. *See Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1233 (10th Cir. 2002) (declining to treat counsel's legal

(continued...)

presented sufficient evidence for purposes of summary judgment to show "injury in fact."

B. Traceability

The Government also contends that the Coalition cannot meet the second and third prongs of the standing test. The showing of traceability must not be too "attenuated," *Allen v. Wright*, 468 U.S. at 757, 104 S. Ct. at 3328, but "the indirectness of the injury does not necessarily deprive the person harmed of standing." *Warth*, 422 U.S. at 505, 95 S. Ct. at 2208. Nevertheless,

> [w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. . . . The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury.

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[9] (...continued)
interpretation of ordinance as judicial admission); *see also Continental Ins. Co. of N.Y. v. Sherman*, 439 F.2d 1294, 1298 (5th Cir. 1971) (refusing to apply judicial admission rule strictly where it conflicted with Federal Rules of Civil Procedure allowing inconsistent pleading). Further, it is conceivable that a government action could have local economic impacts without affecting interstate commerce.

Lujan, 504 U.S. at 562, 112 S. Ct. at 2137 (internal citations and quotations omitted); *see also Tenn. Valley Auth. v. E.P.A*, 278 F.3d 1184, 1205 (11th Cir. 2002), *op. withdrawn in part by* 336 F.3d 1236, 2003 WL 21452521 (11th Cir. June 24, 2003).

The Supreme Court has explained that the "fairly traceable" requirement does not necessitate "injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett*, 520 U.S. at 168-69, 117 S. Ct. at 1164; *see also Tenn. Valley Auth. v. E.P.A.*, 278 F.3d at 1207. Indeed, economic injuries "produced by determinative or coercive effect upon the action of someone else" are distinguishable from those that are merely a result of independent actors not before the court. *Id.*

This case is unlike those in which a plaintiff sues in an attempt to change the behavior of a party not before the court such as *Allen v. Wright*. In *Allen*, the plaintiffs challenged the IRS' grant of tax exemptions to racially discriminatory schools. 468 U.S. at 757, 104 S. Ct. at 3328. The Supreme Court reasoned that the plaintiffs' injury—a diminished ability to receive a desegregated education—was a result not of the IRS' policies, but of decisions by independent actors such as school officials and parents who were not before the Court. *Id.* at 758, 104 S. Ct. at 3328. These points were made more apparent in the Court's redressability analysis: it was "entirely speculative" whether a withdrawal of the tax exemptions would cause a private school to change its discriminatory policies. *Id.* It was similarly speculative whether parents would withdraw their children from these schools and place the children in public schools as a result of a withdrawal of tax exemptions. *Id.* Further, it was not at all clear that "in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." *Id.*

The circumstances here are more akin to those in *Bennett v. Spear*. There, ranch operators and irrigation districts challenged a biological opinion issued by the FWS because it induced the Bureau of Reclamation to limit the amount of irrigation water available to the plaintiffs. 520 U.S. at 167, 117 S. Ct. at 1163. Although the Bureau of Reclamation was not a party before the Court, the Supreme Court reasoned that the FWS' biological opinion had "a powerful coercive effect." *Id.* at 169, 1164. Given the procedural mandates of the ESA, the biological opinion "alter[ed] the legal regime to which the agency action [was] subject." *Id.*; *see also Tenn. Valley Auth. v. E.P.A.*, 278 F.3d at 1207 (holding that traceability was met for power companies standing where TVA's compliance with EPA's orders would result in diminished energy reserves imposing greater costs on power companies).

Here, the Coalition's injuries are produced by the coercive effect of the ESA as implemented by the FWS or NMFS: federal agencies and Coalition members must at least consider whether consultation is necessary for their activities. This point is particularly evident in light of the possibility of the Coalition's members running afoul of the "take" prohibition if they or acting agencies fail to consider the Alabama sturgeon at all with respect to their activities in its historical habitat.[10] For these reasons, we cannot accept the Government's argument that consultation is voluntary because any costs expended by the Coalition are costs it has chosen to expend. The ESA establishes a framework that is coercive rather than voluntary. The Coalition's affidavits provide evidence that its members are

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[10] The Coalition does not argue that its standing arises from any likely violations of the "take" prohibition. However, we think the Coalition's evidenced activities in the context of the full ESA backdrop are important considerations for this standing analysis.

already incurring planning expenses as a result of the listing, illustrating the necessary causal link.

Although there are already other listed species within the waterways in which the Coalition's members operate, the entire framework of the ESA, including the consultation provisions, requires species-specific conservation. *See, e.g.*, 16 U.S.C. § 1536(A)(2) ("[e]ach Federal agency shall . . . insure that any action . . . is not likely to jeopardize the continued existence of any endangered or threatened species" (emphasis added)). To hold that there is no causation because of the presence of other species would be to ignore this central theme of the ESA. Moreover, the four affidavits point specifically to the Alabama sturgeon as the cause of the economic injuries; drawing all reasonable inferences in favor of the non-moving party, as is required at the summary judgment stage, we conclude that the Coalition has provided sufficient evidence of traceability.

C. Redressability

Similarly, the Coalition has submitted sufficient evidence showing redressability. As an initial matter, we note that "[w]hile redressability must not be speculative, it need only be 'likely,' not certain." *Tenn. Valley Auth. v. E.P.A.*, 278 F.3d at 1207. The Coalition seeks a declaration that the Government violated the ESA and APA, which would invalidate the listing. Even though other listed species could trigger the consultation requirement and other statutes could authorize the Government to intervene in permitting matters, these arguments are "insufficient to justify a conclusion that this Court could not redress the injury." *Id.* The traceability of the injury is focused on the marginal impact of the unique species *Scaphirhynchus suttkusi*; so too is the injury redressable because delisting the sturgeon will eliminate the additional considerations of which the Coalition complains. Accordingly, we hold that the Coalition does not lack standing in this case.

Appendix C21

III. Conclusion

For the foregoing reasons, we REVERSE the judgment of the district court and REMAND the case for proceedings consistent with this opinion.

Appendix D1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALABAMA-TOMBIGBEE RIVERS COALITION; PARKER TOWING COMPANY, INC.; CHARLES A. HAUN,	) Civil Action No.) CV-01-S-0194-S)) Filed: July 30, 2002) Entered: July 30, 2002
Plaintiffs,	)
vs.	)
GALE NORTON, Secretary of the United States Department of the Interior; STEVE WILLIAMS, Director of the United States Fish and Wildlife Service; SAM HAMILTON, Regional Director of the United States Fish and Wildlife Service, UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES FISH AND WILDLIFE SERVICE,	)
Defendants.	)

MEMORANDUM OPINION

Plaintiffs—the Alabama-Tombigbee Rivers Coalition, a non-profit Alabama corporation; Parker Towing Company, Inc., an Alabama corporation and a member of the Alabama-Tombigbee Rivers Coalition; and Charles A. Haun, an individual—have sued defendants—Gale Norton, Secretary of the United States Department of the Interior; Steve Williams,

Director of the United States Fish and Wildlife Service ("FWS"); Sam Hamilton, Regional Director of the FWS; the United States Department of the Interior; and the FWS—alleging violations of the Endangered Species Act and the Administrative Procedures Act arising from the listing of the Alabama sturgeon as an endangered species.[1] Plaintiffs ask this court to declare that the final rule listing the Alabama sturgeon as an endangered species is "unlawful and void of any force and effect"[2] for numerous alleged errors or omissions in the rule-making process.

This action now is before the court on plaintiffs' and defendants' cross motions for summary judgment.[3] Federal Rule of Civil Procedure 56(c) provides, in part, that summary judgment not only is proper, but "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

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[1] Doc. no. 1.

[2] *Id.* at 10, 11, 13, 21, 22, 26, 29, 31.

[3] Doc. nos. 44 and 49, respectively.

In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment.

> The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.

Chapman v. AI Transport, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)) (internal quotation marks and citations omitted); *see also United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc).

Upon consideration of the pleadings, evidentiary submissions, and briefs, this court concludes that defendants' motion for summary judgment is due to be granted, and plaintiffs' motion for summary judgment denied, because plaintiffs do not possess Article III standing.[4] Discussion of the merits of plaintiffs' claims is pretermitted.[5]

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[4] "Article III, § 2 of the Constitution extends the "judicial Power" of the United States to actual "Cases" and "Controversies." A lawsuit does not fall within this grant of judicial authority unless, among other things, courts have the power to "redress" the "injury" that the defendant allegedly "caused" the plaintiff. *Utah v. Evans*, 122 S. Ct. 2191, 2197 (2002). "Standing" is a jurisdictional doctrine. *United States v. Hayes*, 515 U.S. 737, 742, 115 S. Ct. 2431, 2435, 132 L. Ed. 2d 635 (1995).

[5] "Without jurisdiction the court cannot proceed at all in any cause.

(continued...)

Appendix D4

I. ENDANGERED SPECIES ACT, 16 U.S.C. § 1531 *et seq.*

The Endangered Species Act ("ESA") is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 2294, 57 L. Ed. 2d 117 (1978). "[E]xamination of the language, history, and structure of the legislation under review here indicates *beyond doubt* that Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174, 98 S. Ct. at 2292 (emphasis in original).

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to "take" endangered species, meaning that no one is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" such life forms. 16 U.S.C. §§ 1532(14), 1538(a)(1)(B) (1976 ed.). Agencies in particular are directed by §§ 2(c) and 3(2) of the Act to "use . . . *all methods* and procedures which are necessary" to preserve endangered species. 16 U.S.C. §§ 1531(c), 1532(2) (emphasis added) (1976 ed.). In addition, the legislative history undergirding § 7

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[5] (...continued)
Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868).

> reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.

Id. at 184-85, 98 S. Ct. at 2297.

The listing process is the "keystone" of the ESA. H.R. No. 97-567, 97th Cong. 2d Sess. 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810. Once a species is listed, statutory prohibitions help ensure the survival and recovery of the species. *See, e.g.*, 16 U.S.C. § 1536 ["Section 7"] (federal agencies' duty to avoid jeopardizing listed species); 16 U.S.C. § 1538 ["Section 9"] (prohibitions against taking of listed species).

The ESA authorizes the Secretary of the Interior to list a species as "threatened" or "endangered."[6] 16 U.S.C. § 1533(a). The listing of a species may occur in one of two ways: either through a "petition process," or a "candidate process." *See Center for Biological Diversity v. Norton*, 254 F.3d 833, 834 (9th Cir. 2001). Under the "candidate process," the FWS designates a species as a candidate species, if review of the species's biological status demonstrates that the FWS has on file sufficient information of biological vulnerability and threat(s) to support the issuance of a proposed rule. *Id.* at 835.

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[6] A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* (6).

Under the "petition process," any "interested person" may petition the Secretary to add a species to the list of endangered or threatened species. 16 U.S.C. § 1533(c)(3). The Alabama sturgeon was listed through the candidate process. 65 Fed. Reg. 26441.

Pursuant to § 4(a)(1) of the ESA, the Secretary must list a species that she determines to be threatened or endangered because of one or more of the following five factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
>
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
>
> (C) disease or predation;
>
> (D) the inadequacy of existing regulatory mechanisms; or
>
> (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The Secretary must make her decision whether to list a species "solely on the basis of the best scientific and commercial data available to him [or her] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species. . . ." 16 U.S.C. § 1533(b)(1)(A).

Listing of a species, whether through the petition process or the candidate process, is done through notice and comment rule-making. 16 U.S.C. § 1533(b)(4). If the Secretary

determines that the listing is warranted, she must publish a notice in the Federal Register that includes the complete text of the proposed rule to implement the action. 16 U.S.C. § 1533(b)(3)(B)(ii). The Secretary must act on the proposed rule within one year of the date of its publication. 16 U.S.C. § 1533(b)(6)(A). At that point, she may: promulgate a final rule listing the species; withdraw the proposed rule, if she finds that there is not sufficient evidence to justify the proposed rule; or extend the one-year period by not more than six months, if she finds that there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned." § 1533(b)(6)(B)(i). If the Secretary pursues the latter option, she must take final action on the petition by the end of the six-month extension period. *Id.*

The ESA provides a number of opportunities for the public to furnish information to the Secretary and comment upon proposed rules prior to publication of a final rule. Once a proposed rule has been published in the Federal Register, the Secretary must provide at least sixty days for all interested parties to comment on the proposed rule and provide any relevant information to the Secretary. 50 C.F.R. § 424.16. In addition, notification of the proposed rule must be published in a newspaper of general circulation in the areas where the species occurs. *Id.* The Secretary must hold at least one public hearing if any person so requests within forty-five days of the proposed rule's publication. *Id.*; 16 U.S.C. § 1533(b)(5)(E).

If a species is listed as endangered, the species is then afforded certain legal protections. For example, Section 9 of the ESA prohibits any illegal or unauthorized "taking" of an endangered species. 16 U.S.C. § 1538(a)(1). The ESA defines the meaning of "take" to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19); *see also*

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 697-701, 115 S. Ct. 2407, 2413-14, 132 L. Ed. 2d 597 (1995) (finding reasonable Secretary's interpretation of the word "harm," as used in the ESA, to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering") (citing 50 C.F.R. § 17.3).

In addition, Section 7 of the ESA requires each Federal agency to ensure that any action authorized, funded, or carried out by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). "Every agency is required to verify that its actions will not jeopardize any . . . listed species by consulting with, and obtaining the assistance of, the Secretary of Interior, acting through the Fish and Wildlife Service," if the listed species lives on land, and through the National Marine Fisheries Service (NMFS), if the listed species lives in water. *Sierra Club v. U.S. Army Corps of Engineers*, No. 01-11179, 2002 WL 1368765, at *1 & n.2 (11th Cir. June 25, 2002).

Once a species is listed, the Secretary may review its status at any time based upon a petition or upon other available data. 50 C.F.R. § 421.21. In addition, any interested person may submit a petition to delist or reclassify a species. 16 U.S.C. §§ 1533(b)(3)(A).

II. SUMMARY OF FACTS

"The Alabama sturgeon (*Scaphirhynchus suttkusi*) is [a] small, freshwater sturgeon that was historically found only in the Mobile River Basin of Alabama and Mississippi." 65 Fed. Reg. 26438 (2000). Plaintiffs assert that scientific evidence

demonstrates that the Alabama sturgeon and the shovelnose sturgeon, found in the Mississippi River Basin, are the same species,[7] but the FWS found that the two fish are different species. 65 Fed. Reg. 26439. "Characters used to distinguish the Alabama sturgeon from the [Mississippi] shovelnose sturgeon (*Scaphirhynchus platorynchus*) include larger eyes, orange color, number of dorsal plates, dorsal fin ray numbers, and the absence of spines on the tip of the snout and in front of its eyes." *Id.* at 26438.

At one time, the Alabama sturgeon's range included about 1,000 miles of the Mobile River system in Alabama, including the Black Warrior, Tombigbee, Alabama, Coosa, Tallapoosa, Mobile, Tensaw, and Cahaba Rivers. *Id.* at 26439. It was so common during the late 1800's and the early 1900's that it was captured commercially. *Id.* On the date of its listing as an endangered species, however, the Alabama sturgeon was very rare, and had been found only in "portions of the [134-mile] length of the Alabama river channel below Millers Ferry Lock and Dam, downstream to the mouth of the Tombigbee River." *Id.* at 26440. Millers Ferry Lock and Dam is in south Alabama, near Camden, Alabama.

The final rule that is at issue in this action states, in part:

> Although unrestricted commercial harvesting of the Alabama sturgeon may have significantly reduced its numbers and initiated a population decline, the present curtailment of the Alabama sturgeon's range is the result of 100 years of cumulative impacts to the rivers of the Mobile River Basin (Basin) as they were developed for navigation, especially during the last 50 years. Navigation development of the Basin affected the sturgeon in major ways. This development

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[7] Doc. no. 45, p. 68.

> significantly changed and modified extensive portions of river channel habitats, blocked long-distant movements, including migrations, and fragmented and isolated sturgeon populations.

Id. at 26440. In other words, the marked decline in population size and range of the Alabama sturgeon is due to the synergistic effect of three agencies: over-fishing; development of the rivers of the Mobile River Basin for navigation and power production; and water-quality degradation. *Id.* at 26438, 26441. Threats to the Alabama sturgeon are compounded by a lack of information on the species's habitat and life history requirements. *Id.* at 26438.

The final rule and other documents in the administrate record indicate "that the decision to list the Alabama sturgeon will not impact economic . . . activities, and that such activities do not threaten the fish."[8] A 1999 news release from defendant Sam Hamilton, FWS's Regional Director, sums up the FWS's opinion of asserted threats to the economy based on the listing of the Alabama sturgeon:

> At the top of the list [of erroneous information regarding the effect of listing the Alabama sturgeon] is the concern that listing the sturgeon will stop current activities in the Alabama and Tombigbee rivers, including navigation channel maintenance dredging. Listing the sturgeon will *not* stop any of these activities, period. There are already four federally listed species in those rivers, one a

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[8] Doc. no. 45 (Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment), pp. 17-18 (citing doc. no. 19 (the administrative record), R-1 at 26450, 26458-61, R-39 at 3-4, R-41 at 1, R-49 at 1).

> sturgeon.[9] Additional of another will not change anything.
>
> . . .
>
> Moreover, if one fish can wreck this region's economy, then the four aquatics species that are already on the list in those rivers should have wrecked it fourfold, a long time ago. It didn't happen, and it won't happen.

Doc. no. 19, R-41 at 1-2 (emphasis in original) (footnote added).

During an earlier listing process, economists at Troy State University submitted an analysis of the economic effect of listing the Alabama sturgeon. That economic impact analysis concluded that navigation of the Alabama and Tombigbee Rivers would be "impossible" if the Alabama sturgeon was listed as an endangered species. *Id.* R-39 at 3. FWS did not agree, as the final rule reflects:

> Section 4(b)(2) of the Act does require us to consider economic or other impacts associated with the designation of critical habitat. However, we believe that the referenced economic impact analysis [prepared by economists at Troy State University] was based upon a set of incorrect assumptions about how the proposed listing would affect economic activity throughout the Mobile River Basin. The referenced analysis made no attempt to identify or quantify any

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[9] The four aquatic species listed as threatened or endangered prior to the present controversy concerning the Alabama sturgeon are: the inflated heelsplitter, listed n 1990; the heavy pigtoe and souther combshell, listed in 1987; and the Gulf sturgeon, listed in 1991. Doc. no. 19, R-38.

past or present economic impact associated with 38 aquatic species currently listed throughout the Basin. For example, there are listed species associates with all of the navigation channels of the Mobile River Basin, yet no negative economic impact on navigation, ports, or marinas due to the presence of these species was documented in the economic analysis. The analysis assumes, however, without justification or examples, that all waterways within the Mobile River Basin will be closed to navigation by the designation of endangered status to the Alabama sturgeon, and estimates economic consequences that might result from a halt in all navigation in the Tennessee-Tombigbee, Tombigbee, Black Warrior, Mobile, and Alabama River channels, and the closing of ports and marinas. The Alabama sturgeon currently inhabits only the lower Alabama River. The Corps and the Service have determined that navigation maintenance has no adverse effect on the Alabama sturgeon. The proposed rule specifically stated that maintenance dredging is unlikely to result in a take of Alabama sturgeon. Therefore, navigation, ports, and marinas will be economically unaffected by this listing.

The economic analysis also assumed that water withdrawals and discharges within the Alabama, Coosa, Tallapoosa, Cahaba, Tombigbee, Black Warrior, and Mobile Rivers and their tributaries would be capped at present levels should the sturgeon be listed. As noted above, the Alabama sturgeon currently inhabits only the lower Alabama River. Water withdrawal has not been identified as a threat to the Alabama sturgeon. In addition, all of the rivers assumed to be impacted by the analysis, and many of their tributaries, currently support populations of

> endangered and threatened species that have been listed for many years, and yet the analysis documented no negative economic impact from water withdrawal and discharge capping due to the presence of these listed species.

64 Fed. Reg. at 26450.

A. Standing Facts

To support their assertions of Article III standing, plaintiffs have submitted four affidavits to demonstrate injury in fact caused by the listing of the Alabama sturgeon as an endangered species.

John D. Grogan, on behalf of Alabama Power Company, a member of the Alabama-Tombigbee Rivers Coalition ("the Coalition"), states that the decision to list the Alabama sturgeon "has caused direct, substantial, specific, and present injuries to Alabama Power, including the operations of its hydroelectric generating units . . . ."[10] Specifically, he states that the listing provides the FWS and National Marine Fisheries Service ("NMFS") an "*opportunity* under the authority of the [ESA] to seek to change Alabama Power's operation of its hydroelectric generating units and management of its reservoirs[,] or subject such operations to adverse conditions."[11] As support for this statement, Grogan refers the court to the motion to intervene in Alabama Power's application to amend its license for the Holt Project on the Black Warrior-Tombigbee Waterway, which is

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[10] Doc. no. 54, Exh. 1 ¶ 5.

[11] *Id.* ¶ 8 (emphasis added).

near Tuscaloosa, Alabama, filed by the NMFS on June 1, 2000. Grogan states:

> NMFS sought to force Alabama Power to expend significant resources to address the presence of the Alabama sturgeon, such as through the installation and construction of fish passage facilities and through implementation of adequate mitigation measures for the protection and enhancement of the habitat of the listed Alabama sturgeon. NMFS specifically relied on its authority under the [ESA] in its Motion to Intervene. Alabama Power expended substantial resources in responding to NMFS's motion to intervene.[12]

The NMFS filed a motion with the Federal Energy Regulation Commission seeking to intervene on the grounds that the affected waterway "supports populations of diadromous fishes[13] including Alabama shad (*Alosa alabamae*), striped bass (*Morone saxatilis*), American eel (*Angu[i]lla rostrata*), Gulf sturgeon (*Acipenser oxyrinchus desotoi*), and Alabama sturgeon (*Scaphirhynchus suttkusi*)," and that the affected waterway "provide[s] existing or potentially restorable habitats for these species, and are vital components of management strategies for these species."[14] The motion to intervene sought to require consideration of "the impact of the proposed project and

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[12] *Id.* ¶ 7.

[13] "Diadromous fishes" are fish that migrate between salt and fresh water. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY <http://www.m-w.com/ cgi-bin/dictionary?va=diadromous>.

[14] Doc. no. 54, Exh. 1, att. 1, pp. 2-3 (footnote added).

measures designed to alleviate these impacts."[15] As authority for its right to intervene, NMFS cited "the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666," which "requires that NMFS be consulted when there is a proposal by a public or private agency under Federal permit or license to impound the waters of any stream or other body of water for any purpose."[16] NMFS also cited the ESA (16 U.S.C. §§ 1536, 1538) as support for its motion, as well as the Federal Power Act (16 U.S.C. § 803(a), (j)), the Anadromous Fish Conservation Act (16 U.S.C. § 757), Magnuson Fishery Conservation & Management Act (16 U.S.C. § 1801, *et seq.*), and the National Environmental Policy Act (42 U.S.C. § 4321, *et seq.*).[17] The record does not

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[15] *Id.* at 4.

[16] *Id.* at 5. Section 662(a) of the Fish and Wildlife Coordination Act states:

> [W]henever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under the Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

[17] *Id.* at 5.

contain evidence to indicate whether the motion to intervene was granted.

Plaintiff Charles A. Haun, who is vice-president of plaintiff Parking Towing Company, submitted an affidavit in support of plaintiffs' standing.[18] Haun avers that the listing of the Alabama sturgeon as an endangered species has injured Parker Towing, which is a "full service marine transportation company operating a fleet of boats and barges which transport many types of dry commodities . . . on the rivers of Alabama."[19] He states:

> The listing of the Alabama sturgeon will delay, prevent, or create conditions and restrictions with respect to the issuance of necessary permits and authorizations for maintenance activities, such as some types of dredging (*i.e.*, more specifically the removal of rock ledges which present a danger to the safe operation of barges and boats), on waterways in Alabama used by Parker Towing. Even if navigation channel dredging will not be completely stopped, the delays caused and conditions created by the requirement to consult with FWS under Section 7 of the Endangered Species Act about Alabama sturgeon (for example obtaining a permit from the Army Corps of engineers) will cause significant adverse economic consequences for Parker Towing.[20]

Haun also avers that changes in the locks and dams on Alabama rivers will interfere with Parker Towing's business, as well as

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[18] Doc. no. 54, Exh. 2.

[19] *Id.* ¶ 2.

[20] *Id.* ¶ 6.

his *personal*, recreational boating activities on the Warrior River.[21] Haun claims a "substantial personal interest in the biodiversity of [Alabama rivers] and the recovery of the Alabama sturgeon."[22] He contends "[t]he FWS's decision to list the Alabama sturgeon as a separate species has caused direct, substantial, specific, and present injuries to me through elimination of the opportunity to recover the Alabama sturgeon by stocking the rivers in Alabama with shovelnose sturgeon which are currently found in abundance throughout the Mississippi River basin."[23]

Ralph O. Clemens, president of both the Coalition and Coosa-Alabama Rivers Improvement Association, asserts that "the listing of the Alabama sturgeon provides the FWS and/or [NMFS] the opportunity to intervene, require consultation, and otherwise participate under the authority of the [ESA] in various permitting and licensing issues involving members of the Coalition."[24] He states:

> [T]he Coalition has been at the forefront of the recovery efforts for the Alabama sturgeon for over seven (7) years and has proven and [sic] on-going substantial interest in any actions which will impact the sturgeon's recovery, including FWS's decision to list the Alabama sturgeon as a separate species. As a result of the listing, the Coalition's members are now

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[21] *Id.* ¶¶ 3, 7. The final rule states that the Alabama sturgeon has not been found in the Warrior River Basin for decades and that the only known area in which it has been found is in south Alabama. 64 Fed. Reg. 26440.

[22] *Id.* ¶ 4.

[23] *Id.*

[24] Doc. no. 54, Exh. 3 ¶ 4.

> forbidden by the ESA from participating in sturgeon repopulation efforts utilizing the shovelnose sturgeon currently found in abundance in the Mississippi River basin so long as the Alabama sturgeon remains listed as a separate endangered species.[25]

Richard J. Oates, Executive Director of the Alabama Pulp and Paper Council, a member of the Coalition, asserts that "the decision to list the Alabama sturgeon as an endangered species has caused direct, substantial, specific, and present injuries to the Council, the Coalition, and their members."[26] This injury arises from the "opportunity to intervene, [to] require consultation, and otherwise [to] participate" given to the FWS by the authority of the ESA.[27] As support for his claim of "direct, substantial, specific, and present" injury,[28] Oates refers the court to an incident of FWS intervention, prior to the listing of the Alabama sturgeon. He states, "even before the Alabama sturgeon was listed as endangered . . ., FWS commented on an application from Kimberly-Clark Corporation for a maintenance dredging permit for an existing dry dock slip, stating that the company's dredging activities could threaten various sturgeon species."[29] Specifically, the FWS's letter to the Army Corps of Engineers regarding the Kimberly-Clark dredging project, dated May 10, 1999, states:

> The Service does not object to this proposed project. However, the federally listed Gulf Sturgeon

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[25] *Id.* ¶ 8.

[26] Doc. no. 54, Exh. 4 ¶ 1.

[27] *Id.* ¶ 3.

[28] *Id.* ¶ 1.

[29] *Id.*

> (*Acipenser oxyrinchus desotoi—Threatened*) and the proposed for listing, Alabama sturgeon (*Scaphirhynchus suttkusi*) are found in these waters. The Gulf sturgeon is an anadromous fish which migrates from salt water into large coastal rivers to spawn and spend the warm months. According to our records the Gulf sturgeon seasonally occurs and the Alabama sturgeon is a permanent resident within the Mobile River. Throughout their ranges these species have had their forage sand spawning habitats adversely affected from dams. In additional, dredging . . . carried out in connection with channel improvement and maintenance represent an ongoing threat to these sturgeon species.
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> In order to avoid adverse impacts to these species covered by the [ESA], we recommend that the applicant implement Best Management Practices (BMPs) including the use of turbidity screens, as necessary, to minimize turbidity downstream of the project site. Dredging Activities should not exceed ambient water clarity of more than 50 Nephelometric turbidity units (NTUs). The Service believes that your project will not have an adverse effect on these sturgeon species, if these BMPs are followed. If these conditions are not acceptable then further consultation with this office is recommended in accordance with section 7 of the ESA.[30]

Plaintiffs have not, however, provided the court evidence indicating whether the proposed conditions were acceptable to Kimberly-Clark, whether the BMPs were implemented by Kimberly-Clark, or what, if any, direct and concrete harm this letter caused. Instead, Oates merely asserts: "The mere fact

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[30] *Id.*, att. 1.

that consultation with FWS is now required by virtue of the listing of the Alabama sturgeon causes members of the Council and the Coalition injury in the form of planning expenses, costly studies, and project delays."[31] Even assuming that assertion to be true, plaintiffs still have not submitted evidence of the "expenses, costly studies, and project delays" actually incurred by them, or other members of the Coalition, as a result of the listing of the Alabama sturgeon and/or consultation with the FWS.

III. DISCUSSION

The determination of whether a plaintiff possesses standing to assert a claim must be made "by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325, 82 L. Ed.2d 556 (1984) (quoting *Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 1951, 20 L. Ed.2d 947 (1968); *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 12 S. Ct. 400, 402, 36 L. Ed. 176 (1892)).

Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of establishing standing. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04, 118 S. Ct. 1003, 1017, 140 L. Ed.2d 210 (1998). Each plaintiff has the burden of establishing its (or his) standing with regard to each request for relief. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40, 96 S. Ct. 1917, 1925, 48 L. Ed.2d 450 (1976) ("The standing question in this suit therefore turns upon whether any individual [plaintiff] has established an actual injury, or whether the [plaintiff organization has]

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[31] *Id.* ¶ 4.

established actual injury to any of their . . . members."). The measure of proof required to establish standing is determined by the stage of the proceedings. To demonstrate standing at the summary judgment stage, plaintiffs have the burden to produce evidence of an injury in fact, which will be taken as true for purposes of deciding the motion for summary judgment. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137, 119 L. Ed.2d 351 (1992).

The Supreme Court has said that a plaintiff must meet three requirements in order to establish Article III standing:

> First, [they] must demonstrate injury in fact—a harm that is both concrete and actual or imminent, not conjectural or hypothetical. Second, [they] must establish causation—a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant[s]. And third, [they] must demonstrate redressability—a substantial likelihood that the requested relief will remedy the alleged injury in fact. These requirements together constitute the irreducible constitutional minimum of standing, which is an essential and unchanging part of Article III's case-or-controversy requirement, and a key factor in dividing the power of government between the courts and the two political branches.

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 771, 120 S. Ct. 1858, 1861-62, 146 L. Ed.2d 836 (2000) (citing *Lujan*, 504 U.S. at 560; *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed.2d 135 (1990); *Simon*, 426 U.S. at 41, 45) (internal citations and quotation marks omitted).

The parties do not dispute that no plaintiff has been the subject of any direct action for civil or criminal penalties for

"taking" an Alabama sturgeon in violation of Section 9 of the ESA. Therefore, because plaintiffs' alleged injuries have resulted from government regulation, not specific governmental action taken against them, their burden to prove standing is somewhat more difficult. The Supreme Court in *Lujan* held:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, *much more is needed.* In that circumstance, causation and redressability ordinarily hinge on the response of the regulated . . . third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, and *it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.*

Lujan, 504 U.S. at 561-62 (citing *Simon*, 426 U.S. at 41-42, 44-45; *Warth v. Seldin*, 422 U.S. 490, 505, 95 S. Ct. 2197, 2208, 45 L. Ed.2d 343 (1975); *Allen*, 468 U.S. at 758) (emphasis added).

To establish an injury in fact, plaintiffs must show that the injury is "concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical." *Whitmore*, 495 U.S. at 155, 110 S. Ct. at 1723 (internal citations and quotation marks omitted). "Some day intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the actual or imminent injury that [the Supreme Court's] cases require." *Lujan*, 504 U.S. at 564, 112 S. Ct. at 2138 (internal citations and quotation marks omitted).

To establish causation, plaintiffs must show a "fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant." *Vermont Agency of Natural Resources*, 529 U.S. at 771, 120 S. Ct. at 1861 (internal citations and quotation marks omitted). "Although the law of standing has been greatly changed in (recent) years, [the Supreme Court has] steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Simon*, 426 U.S. at 41, 91 S. Ct. at 1925-26.

To establish redressability, plaintiffs must show "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Vermont Agency of Natural Resources*, 529 U.S. at 771, 120 S. Ct. at 1861-62 (internal citations and quotation marks omitted). "Relief that does not remedy the

injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107, 118 S. Ct. at 1019.[32] "To the extent there is a difference [between causation and redressability], it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. *Allen*, 468 U.S. at 753 n. 19, 104 S. Ct. at 3325 n.19.

In their complaint, plaintiffs allege that the listing of the Alabama sturgeon affects the Coalition's "vital economic interests in the river system in which the Alabama sturgeon is, or has been, or potentially will be, found and regulated."[33] Similarly, Parker Towing and Charles Haun contend that they have business interests that will be harmed by the listing of the Alabama sturgeon. Haun asserts that he has an interest in using the river system for recreational purposes that is adversely affected by the listing of the Alabama sturgeon. Plaintiffs contend that listing the Alabama sturgeon as an endangered species harms their interests in conserving the Alabama sturgeon by prohibiting breeding the shovelnose sturgeon with the Alabama sturgeon and/or stocking shovelnose sturgeon in Alabama rivers. They also contend that they are harmed by the requirement to consult with the FWS and/or NMFS regarding new or existing projects on Alabama rivers. Plaintiffs contend

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[32] "By the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that *psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury*." *Steel Co.*, 523 U.S. at 107, 118 S. Ct. at 1019 (emphasis added).

[33] Doc. no. 1, ¶ 5.

that these injuries or harms to their interests support a finding that they have Article III standing. They also argue that this court is bound by a prior decision of another judge of this court in a separate proceeding, based on allegations of wrongdoing during the rule-making process, that found that the Coalition had standing to seek preliminary injunctive relief based on the undisputed facts alleged in the complaint.

For the reasons set forth below, however, this court finds that a prior decision by another judge of this court on a separate, but related, matter does not preclude consideration of plaintiffs' standing in this case. Moreover, the court finds that evidence produced by plaintiffs is insufficient to demonstrate that they have standing. Therefore, for the reasons set forth below, the court finds that the record does not support plaintiffs' claim that they have Article III standing.

A. Issue Preclusion

Plaintiffs contend "the issue of [their] standing to challenge FWS'[s] decision to list the Alabama sturgeon as an endangered species has previously been resolved by *final* judgment entered in litigation in this same Court between these very same parties. . . . Defendant did not appeal that *final* decision, and so are collaterally estopped from relitigating that issue here."[34]

In support of their collateral estoppel argument, plaintiffs direct this court to the memorandum opinion and preliminary injunction entered by another judge of this court in *Alabama-Tombigbee Rivers Coalition v. Fish and Wildlife Service of the United States Department of the Interior*, CV 93-AR-2322-S,

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[34] Doc. no. 55 at 4 (emphasis added).

docs. 11 & 12 (N.D. Ala. 1993).[35] Plaintiffs do not cite the court to a final or permanent injunction.

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the *judgment* in the prior suit precludes relitigation of issues *actually litigated* and *necessary to the outcome* of the first action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed.2d 552 (1979) (citing, *inter alia*, 1B.J. Moore, FEDERAL PRACTICE ¶ 0.405[1], pp. 622-624 (2d ed. 1974)) (emphasis added). "Collateral estoppel can foreclose relitigation of an issue of fact or law where that *identical* issue has been fully litigated and decided in a prior suit." *Grosz v. City of Miami Beach*, 82 F.3d 1005, 1006 (11th Cir. 1996) (citing *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986)) (emphasis added).

"As a general rule, decisions on preliminary injunctions do not constitute law of the case and parties are free to litigate the merits." *William G. Wilcox, D.O., P.C. Employees' Defined Ben. Pension Trust v. United States*, 888 F.2d. 1111, 1114 (6th Cir. 1989); *see also University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L. Ed.2d 175 (1981). Thus, the findings supporting a preliminary injunction generally would not support a claim of issue preclusion in a separate, subsequent proceeding.

Moreover, the issue of standing in this case is different from the consideration of standing in the prior case. "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most

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[35] *Id.* at 4-5; *see also* Doc. no. 54, Exh. 5.

important of the jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742, 115 S. Ct. 2431, 2435, 132 L. Ed.2d 635 (1995). Plaintiffs in this case seek relief from injuries caused by defendants' allegedly improper listing of the Alabama sturgeon as an endangered species; the prior action apparently concerned injuries from committee reports and committee meetings during the rule-making process in violation of the ESA. The actions of defendants at issue in these two proceedings are different; therefore, the issue of standing arising from injuries suffered because of these actions are different.

The court finds that the two proceedings did not involve identical issues; therefore, defendants' argument that plaintiffs lack Article III standing to challenge the listing of the Alabama sturgeon is not precluded by the preliminary injunction order and memorandum opinion in the prior case.

B. Merits of Plaintiffs' Article III Standing

Plaintiffs have provided four affidavits to demonstrate their Article III standing. For the reasons set forth below, the court finds that this evidence is insufficient to establish a genuine issue of material fact as to whether the listing of the Alabama sturgeon as an endangered species caused plaintiffs personal, concrete injury, which is actual or imminent, that may be remedied by the requested relief.

1. Opportunity to intervene—harm to economic activities

Plaintiffs, in their briefs in support of their motion for summary judgment, state that the decision to list the Alabama sturgeon "will not impact economic or interstate activities," including navigation, maintenance dredging, and hydroelectric

power production.[36] Yet, plaintiffs contend that they have been injured, or injury is imminent, because the listing of the Alabama sturgeon provides the FWS and MNFS with the "opportunity to intervene . . . or otherwise participate under the authority of the [ESA] in various permitting and licensing issues involving members of the Coalition,"[37] which they allege will cause "planning expenses, costly studies, and project delays."[38] Plaintiffs, however, have not presented any evidence of *actual* "planning expenses, costly studies, and project delays." Given plaintiffs' recognition that the findings set forth in the final rule that the listing will not impact economic activities, plaintiffs' bare assertion that an "opportunity" for such an impact exists is inadequate to establish an injury in fact fairly traceable to the listing of the Alabama sturgeon.

The court notes that businesses operating along Alabama waterways may be subject to consultation with, or "interference" from, Federal agencies under numerous environmental statutes, not just the ESA. Also, the court notes that the Alabama sturgeon is not the only endangered or threatened species in these waterways. It is simply not enough to establish constitutional standing for plaintiffs to argue that a business *may* have to consult with a federal agency, and *may* have to consider the environmental impacts of its proposed or intended actions (which were required before the listing, and which could be required even if the court found the listing of

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[36] Doc no. 45 at 17-18 (citing R-1 at 26450, 26458, 26460; R-39 at 3; R-41 at 1-2; R-49 at 1). Plaintiffs assert, "[T]hroughout the listing process and in the Final Rule, the Defendants admit in various ways that the decision to list the Alabama sturgeon will not impact economic or interstate activities, and that such activities do not threaten the fish . . . ." *Id.* at 17.

[37] Doc. no. 54, Exh. 3 ¶ 4; *see id.* Exh. 1 ¶ 8, Exh. 4 ¶ 3.

[38] Doc. no. 54, Exh. 4 ¶ 4.

the Alabama sturgeon as an endangered species was void). Plaintiffs must show that have real and concrete injuries, or the imminent threat of such injuries, fairly traceable to the listing of the sturgeon, *and*, that de-listing the sturgeon would remedy such injuries. A bare assertion that plaintiffs have been injured because FWS or NMFS has another "opportunity" to interfere with their business operations is not sufficient to show a real and concrete injuries fairly traceable to the listing of the Alabama sturgeon as an endangered species.

Therefore, the court finds that the conjectural threat of the "opportunity" for economic injury because of the listing of the Alabama sturgeon is not sufficient to establish that plaintiffs have Article III standing for their claims based on the listing of the Alabama sturgeon as an endangered species.

2. NMFS's motion to intervene

Plaintiffs, particularly Coalition member Alabama Power Company, contend that they have an injury in fact because "Alabama Power expended substantial resources in responding to NMFS's motion to intervene" in the Power Company's application to the Federal Energy Regulatory Commission, seeking to amend its project license for the Holt Lock and Dam Hydroelectric Project. The court notes that there is evidence that the Alabama sturgeon does not exist in the waters surrounding the Holt Lock and Dam project.[39] Moreover, NMFS sought to intervene in this petition pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666, which requires that the NMFS "be consulted when there is a proposal by a public or private agency under Federal permit or license to impound the waters of any stream or other body of water for

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[39] 65 Fed. Reg. 26440; Doc. no. 19, R-39.

any purpose."[40] NMFS lists numerous statutes, including the ESA, as additional statutory authority for its motion to intervene, but the Fish and Wildlife Coordination Act gave the NMFS authority to intervene in the Holt Lock and Dam application without reference to the Endangered Species Act. Also, the motion to intervene lists five species of diadromous fish (including the Alabama sturgeon) for which the waters surrounding the Holt dam project are "existing or potentially restorable habitats . . . and are vital components of management strategies."[41] Of these five fish, the Alabama sturgeon, the Gulf sturgeon, and the Alabama shad are threatened or endangered species.

The court finds that any injury based on costs expended by the Alabama Power Company to oppose NMFS's motion to intervene are not fairly traceable to the listing of the Alabama sturgeon as an endangered species, and, will not be remedied by a judgment in favor of the plaintiffs declaring the listing of the Alabama sturgeon unlawful and void. Clearly, NMFS's right to intervene is conferred by statutory authority other than the Endangered Species Act, the Alabama sturgeon is not the only endangered species on NMFS's list, and there is no evidence that any modification to Alabama Power Company's application will be compelled by NMFS based on the listing of the Alabama sturgeon, which has not been found in the waters around Holt Lock and Dam. Any order finding that the listing of the Alabama sturgeon as an endangered species is "unlawful and void of any force and effect" would not prevent NMFS from intervening, or moving to intervene, in any application for a "permit or license to impound the waters of any stream or

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[40] Doc. no. 54, Exh. 1, att. 1 at 5.

[41] *Id.* at 3.

other body of water for any purpose,"[42] just as it did in Alabama Power's Holt Dam proceedings. In short, the authority of the NMFS to intervene in the Holt Lock and Dam application is established by statutes independent of the Endangered Species Act, and it is not dependent on the listing of the Alabama sturgeon.

Therefore, the court finds that the Coalition does not have standing based on an alleged injury resulting from the defense costs incurred by a Coalition member, and resulting from the NMFS's motion to intervene in the Holt Dam application, because the Coalition has not shown either that the costs of opposing the NMFS motion to intervene are "fairly traceable" to the listing of the Alabama sturgeon, or that such "injury" is redressable by a favorable decision of this court.

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[42] 16 U.S.C. § 662(a); *see also* 16 U.S.C. 803(j). The Federal Power Act, 16 U.S.C. § 803(j)(1), provides:

> (1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, *each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement.* Subject to paragraph (2), *such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) [16 U.S.C.A. § 661 et seq.] from the National Marine Fisheries Service*, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

16 U.S.C. § 803(j) (emphasis added).

3. Kimberly-Clark dredging activities

Plaintiffs contend that, based on FWS consultation with Kimberly-Clark regarding dredging activities, the FWS will interfere with the operations of the members of the Coalition. Richard J. Oates, Executive Director of Alabama Paper & Pulp Council, another member of the Coalition, states: "The mere fact that consultation with FWS is now required by virtue of the listing of the Alabama sturgeon causes members of the . . . Coalition injury in the form of planning expenses, costly studies, and project delays." *Id.* ¶ 4.

As stated above, plaintiffs acknowledge that, during the listing process and in the final rule, defendants found that the listing of the Alabama sturgeon would not impact navigation and channel maintenance. Moreover, in light of the undisputed finding that the listing of the Alabama sturgeon would not interfere with channel maintenance dredging, the court fails to see how FWS's "interference" with dredging activities prior to the final rule listing the sturgeon supports a reasonable inference that (1) FWS has or will, imminently, interfere with a Coalition member after the final rule, and (2) such interference is (or will be) fairly traceable to the listing of the Alabama sturgeon. The FWS letter regarding the Kimberly Clark dredging situation specifically notes that, in addition to the Alabama sturgeon (a proposed listing), the Gulf Sturgeon, a threatened species, was found in the waters covered by Kimberly-Clark's application. Moreover, nothing in the record supports a reasonable inference that de-listing the Alabama sturgeon would remedy or prevent "interference" by FWS or NMFS, especially in light of the existence of endangered or threatened species in the same waters and clear statutory authority authorizing such "interference" without reference to the existence of a listed, endangered species.

4. Stocking and breeding Mississippi shovelnose sturgeons

Plaintiffs contend that their conservation efforts with regard to the Alabama sturgeon have been adversely affected by the listing of the Alabama sturgeon as a separate species from the Mississippi shovelnose sturgeon. They contend:

> Among the purposes of the Coalition are to participate in the development, funding, and implementation of Conservation Agreements . . . such as the Alabama Sturgeon Conservation Agreement which was signed by the Coalition on February 9, 2000. One *possible* recovery measure for the Alabama sturgeon includes repopulation of Alabama waters by breeding and stocking the shovelnose sturgeon which are currently abundant in the Mississippi River basin. . . . The Coalition cannot participate in such repopulation efforts utilizing shovelnose sturgeon as long as the Alabama sturgeon is listed as a separate endangered species.[43]

However, plaintiffs have offered no evidence demonstrating that they actually planned or intended to stock and/or breed the shovelnose sturgeon in Alabama waters. Rather, this particular form of repopulation is no more than a hypothetical "recovery measure." As such, the prohibition of such a hypothetical recovery measure, with no evidence that plaintiffs intended or planned to implement such a measure, in not an injury in fact. "Some day intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the actual or imminent injury that [the Supreme Court's] cases

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[43] Doc. no. 54, Exh. 1 ¶ 7 (emphasis added); *see id.*, Exh. 2 ¶ 4; *id.*, Exh. 3 ¶ 8.

require." *Lujan*, 504 U.S. at 564, 112 S. Ct. at 2138 (internal citations and quotation marks omitted).

Therefore, plaintiffs do not have standing based on the prohibition of a "possible" recovery measure, without evidence to indicate that the recovery measure was intended or planned.

5. Recreational Boating

Plaintiff Charles A. Haun contends that "[c]hanges in the operation or physical design of dams and their associated lock facilities [along rivers within the historic range of the Alabama sturgeon] which alter the flow of the rivers will interfere with [his] recreational boating activities."[44] Haun's affidavit fails to indicate that such changes have occurred, or that they are imminent, much less that these future changes would harm his boating activities, the details of which are not apparent from his affidavit.[45] Plaintiffs note that, during the rule-making process, fishing and recreational activities were not impacted by the decision to list the Alabama sturgeon. Doc. no. 45, pp. 17-18 (citing R-39 at 4). No evidence has been offered that changes to locks and dams because of the listing of the Alabama sturgeon have occurred, or that changes are imminent.

The court finds that Haun's alleged injury based on some future "interference" with his recreational boating activities to be caused by changes in unidentified locks and dams brought about by the listing of the Alabama sturgeon as an endangered

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[44] Doc. no. 54, Exh. 2 ¶ 3.

[45] *Id.* Haun states: "I have personally used various rivers in Alabama, which . . . are within the historic range of the Alabama sturgeon, for recreational boating. I intend to continue to do so in the future. Changes in the operation or physical design of dams and their associated lock facilities which alter the flow of the rivers will interfere with my recreational boating activities." *Id.*

species is insufficient to establish that he has suffered an injury in fact, or that such an injury is imminent from the listing of the Alabama sturgeon.

Because plaintiffs have failed to demonstrate Article III standing, their claims against defendants are due to be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, plaintiffs' motion for summary judgment (doc. 44) is due to denied, and defendants' motion for summary judgment (doc. 49) is due to be granted. An appropriate order consistent with this memorandum opinion will be entered contemporaneously herewith.

DONE this 30th day of July, 2002.

/s/ Lynwood Smith
United States District Judge

Appendix E1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-17164-JJ

ALABAMA-TOMBIGBEE RIVERS COALITION,
an Alabama nonprofit corporation,
PARKER TOWING COMPANY, INC.,
an Alabama corporation,
CHARLES A. HAUN,
an individual,

Plaintiffs-Appellants,

versus

DIRK KEMPTHORNE, Secretary of the United States Department of the Interior, SAM HAMILTON, Regional Director of the United States Fish and Wildlife Service, U.S. DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, an agency of the United States Department of the Interior, STEVE WILLIAMS, Director of Fish and Wildlife Service,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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Filed May 3, 2007

Appendix E2

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: CARNES, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Carnes
United States Circuit Judge

Appendix F1

16 U.S.C.A. § 1533

Effective November 24, 2003

United States Code Annotated Currentness
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

§ 1533. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 1538 of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a) (1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection

of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * *

Appendix F5

16 U.S.C.A. § 1536
United States Code Annotated Currentness
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)
§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened

species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a) (3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a) (3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a) (2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds,

and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied

with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

* * * *

16 U.S.C.A. § 1538
United States Code Annotated Currentness
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)
§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * *

No. 07-364

In the Supreme Court of the United States

ALABAMA-TOMBIGBEE RIVERS COALITION, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the listing of the Alabama sturgeon as an endangered species pursuant to Section 4 of the Endangered Species Act of 1973, 16 U.S.C. 1533 (2000 & Supp. V 2005), was a permissible exercise of federal authority.

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In the Supreme Court of the United States

No. 07-364

ALABAMA-TOMBIGBEE RIVERS COALITION, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 477 F.3d 1250. A prior opinion of the court of appeals (Pet. App. C1-C21) is reported at 338 F.3d 1244. The opinion of the district court (Pet. App. B1-B25) is unreported. A prior opinion of the district court (Pet. App. D1-D35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2007. A petition for rehearing was denied on May 3, 2007 (Pet App. E1-E2). On July 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including Septem-

ber 14, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 5, 2000, the Fish and Wildlife Service (FWS) listed the Alabama sturgeon as an "endangered species" pursuant to Section 4 of the Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1533 (2000 & Supp. V 2005). Pet. App. A3. Petitioners brought various challenges to the listing decision, alleging, inter alia, that the listing of the species exceeded the federal government's authority under the Commerce Clause and was therefore unconstitutional. *Id.* at A38. The district court dismissed the suit for lack of standing, *id.* at D1-D35, but the court of appeals reversed and remanded for further proceedings, *id.* at C1-C21. On remand, the district court granted the government's motion for summary judgment with respect to the claim at issue in this Court. *Id.* at B1-B25. The court of appeals affirmed. *Id.* at A1-A49.

1. Congress enacted the ESA to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). Section 4 of the ESA directs the Secretaries of Commerce and the Interior to list threatened and endangered species and to designate their critical habitats. See 16 U.S.C. 1533 (2000 & Supp. V 2005).[1] The FWS implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. See 50

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[1] An "endangered species" is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A "threatened species" is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

C.F.R. 17.11 & 222.01(b). The National Marine Fisheries Service (NMFS) administers the Act with respect to species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.101(a), 223.102.

After a species has been listed as endangered or threatened, the ESA imposes various restrictions on governmental and private conduct that might affect the species. Section 7(a)(1) of the Act provides that "[t]he Secretary [of Commerce or the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter," and that "[a]ll other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1). Section 7(a)(2) states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2); see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2526 (2007).

Section 9(a)(1)(B) of the ESA, which applies to private as well as governmental actors, generally makes it unlawful for any person to "take any [endangered] species within the United States or the territorial sea of the United States." 16 U.S.C. 1538(a)(1)(B). The ESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such activity." 16 U.S.C. 1532(19); see 50 C.F.R. 17.3; *Babbitt* v. *Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 696-708 (1995) (uphold-

ing regulatory definition of "harm"). FWS and NMFS may authorize "incidental takes" of listed species under certain circumstances, see 16 U.S.C. 1536(b)(4)(C)(i)-(iv); 16 U.S.C. 1539(a)(2)(B)(i)-(v), and any take of a listed species consistent with such authorization does not violate Section 9, see 16 U.S.C. 1539(a)(1)(B).

2. The Alabama sturgeon is a freshwater fish that grows to about 31 inches in length and two to four pounds in weight. See 65 Fed. Reg. 26,438 (2000). Its range formerly included approximately 1000 miles of the Mobile River system in Alabama, and the fish was once so common that it was captured commercially. *Id.* at 26,439. By the year 2000, however, the Alabama sturgeon was known to inhabit only about 15% of its earlier range, and it was known to survive only in a 134-mile portion of the Alabama River channel. *Id.* at 26,441. The marked decline in population and range of the Alabama sturgeon is due primarily to over-fishing, development of the rivers of the Mobile River Basin for navigation and power production, and water-quality degradation. *Id.* at 26,438, 26,441. On May 5, 2000, the FWS listed the Alabama sturgeon as an endangered species. *Id.* at 26,438; see Pet. App. A3.

3. Petitioners filed suit in federal district court, asserting a variety of statutory and constitutional challenges to the FWS's listing of the Alabama sturgeon. See Pet. App. B2-B3 (summarizing petitioners' claims). Petitioners contended, inter alia, that the listing decision "was not within the powers granted to Congress by the Constitution under the Commerce Clause." *Id.* at B2. The district court dismissed the suit for lack of standing. *Id.* at D1-D35.

The court of appeals reversed and remanded for further proceedings. Pet. App. C1-C21. In holding that pe-

titioners had standing to sue, the court of appeals noted that the members of petitioner Alabama-Tombigbee Rivers Coalition "operate their businesses subject to federal licenses and permits," and that "portions of the members' licensed or permitted activities take place in historical Alabama sturgeon habitat." *Id.* at C16. The court found it "reasonable to infer from the Coalition's evidence that its members have settled expectations with respect to the viability of their businesses," and it stated that "[t]he listing [of the Alabama sturgeon] adds another layer of concrete economic considerations that may be in tension with the members' pre-listing assumptions." *Ibid.* The court emphasized in particular "the possibility of the Coalition's members running afoul of the [ESA's] 'take' prohibition if they or acting agencies fail to consider the Alabama sturgeon at all with respect to their activities in its historical habitat." *Id.* at C19.

On remand, the district court granted the government's motion for summary judgment on petitioners' challenges to the listing of the Alabama sturgeon. Pet. App. B1-B25.[2] In rejecting petitioners' contention that the listing exceeded Congress's Commerce Clause authority, the district court explained that three courts of appeals had sustained the ESA's application to "intrastate, noncommercial species." *Id.* at B13; see *id.* at B8-B14. The court concluded that "[t]he listing of a purely

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[2] The district court agreed with petitioners that the FWS had breached its obligation under 16 U.S.C. 1533(a)(3)(A) (Supp. V 2005) to designate critical habitat for the Alabama sturgeon. See Pet. App. B23-B25. The court directed the FWS "to publish a proposed critical habitat determination for the Alabama Sturgeon no later than six months following the issuance of the [court's] order and a final determination no later than one year following the issuance of the order." *Id.* at B25. That aspect of the district court's decision is not before this Court.

intrastate, noncommercial species under the ESA does not violate the Commerce Clause because 'the "incalculable" value of the genetic heritage that might be lost absent regulation' would undoubtedly harm interstate commerce in a permanent and irreparable way." *Id.* at B14 (quoting *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 639 (5th Cir. 2003), cert. denied, 545 U.S. 1114 (2005) (*GDF Realty*)).

4. The court of appeals affirmed. Pet. App. A1-A49. In rejecting petitioners' contention that the listing of the Alabama sturgeon exceeded Congress's power under the Commerce Clause, see *id.* at A38-A49, the court agreed with the holdings of three other circuits that the ESA "is a general regulatory statute bearing a substantial relation to commerce," *id.* at A41. The court explained that, in the aggregate, protection of listed species has a variety of substantial economic effects, *id.* at A41-A43, and that "[t]he decision to list a species as endangered or threatened is a necessary precondition to the protection afforded species under the Act," *id.* at A44.

The court of appeals also rejected petitioners' contention that, because the Alabama sturgeon is "a purely intrastate species" with no "demonstrated commercial value," the ESA is unconstitutional as applied to the particular listing decision at issue here. Pet. App. A44; see *id.* at A44-A49. The court explained that even species located within a single State may be found to have significant economic value or unanticipated importance to the larger ecosystem. See *id.* at A44-A46. The court also noted that the Alabama sturgeon "was once harvested commercially," and that the ESA's protections "may one day allow the replenishment of its numbers and eventual, controlled, commercial exploitation of the

fish." *Id.* at A46. The court concluded that here, as in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), "Congress had a rational basis for believing that regulation of an intrastate activity was an essential part of a larger regulation of economic activity." Pet. App. A49.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The exercise of federal power that petitioners challenge in this case is not the regulation of private conduct *per se*, but rather the FWS's decision to *list* the Alabama sturgeon as an endangered species. See, *e.g.*, Pet. 5, 22, 23, 24, 25, 29. Similarly in the court of appeals, petitioners contended "that the Final Rule [listing the Alabama sturgeon] should be vacated because Congress has exceeded the power granted to it under the Commerce Clause." Pet. App. A38. Petitioners' constitutional challenge to the listing decision lacks merit.

Under the ESA, listing of a species as endangered or threatened triggers an array of legal protections. In addition to the "take" prohibition contained in Section 9, 16 U.S.C. 1538, listing of a new species implicates the duty of federal agencies to carry out appropriate conservation programs, see 16 U.S.C. 1536(a)(1), and to "insure" that agency actions are "not likely to jeopardize the continued existence of" the newly-listed species, see 16 U.S.C. 1536(a)(2). Quite apart from its powers under the Commerce Clause, Congress has ample constitutional authority to direct Executive Branch agencies to conduct their *own* activities in ways that are protective of listed species. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 1

(Congress has power to spend money to "provide for the * * * general Welfare of the United States."); *id.* Art. IV, § 3, Cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). The remedy that petitioners seek—vacatur of the FWS's decision to list the Alabama sturgeon as an endangered species—would frustrate Congress's effort to ensure that the government's own conduct is adequately protective of species meeting the statutory listing criteria.

As we explain below (see pp. 9-16, *infra*), the ESA's restrictions on private conduct are constitutional on their face and as applied to the activities in which petitioners and their members propose to engage. But even if petitioners could demonstrate that particular ESA provisions are unconstitutional as applied to their own conduct, there would be no basis for setting aside the FWS's decision to list the Alabama sturgeon as endangered. The specific agency action that petitioners challenge is therefore constitutional under any plausible conception of Congress's powers. That fact is an independently sufficient basis for this Court to deny the petition for a writ of certiorari.[3]

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[3] In opposing petitioners' motion for summary judgment in the district court, the government contended that petitioners' challenge to the listing decision was misdirected because, independent of its Commerce Clause authority to regulate private conduct that may harm listed species, Congress has power to regulate the federal government's own operations. In support of that contention, the government cited, inter alia, Article I, Section 8, Clause 14 of the United States Constitution, which authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." The government subsequently withdrew that argument. But even though the argument at pp. 7-8, *supra*, was not preserved in the courts below, it provides an

2. Even if petitioners had directed their challenge at the ESA's application to their own conduct, their claim would not warrant this Court's review. Petitioners do not describe the conduct in which they and their members wish to engage. The record in this case makes clear, however, that federal regulation of petitioners' own activities is well within Congress's authority.

The complaint in this case alleged that petitioner Alabama-Tombigbee Rivers Coalition and its members

> have direct and substantial interests in the listing of the Alabama sturgeon because, among other reasons, one or more of them (i) own and operate dams on Alabama rivers and rely on and require, in conjunction with such ownership and operations, the ability to regulate the stream flow of those rivers; (ii) navigate the Alabama waterways, as part of their business operations, and rely on and require the continuing ability of the United States [Army] Corps of Engineers to dredge and maintain navigable channels in such rivers; (iii) discharge effluent to Alabama rivers and, therefore, rely on and require the continuing ability of the Environmental Protection Agency and the Alabama Department of Environmental Management to continue to issue discharge permits; and (iv) withdraw water from Alabama rivers as an integral component of their industries and rely on and require the continuing ability to do so.

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independent ground for affirmance of the Eleventh Circuit's judgment. In addition, petitioner's focus throughout this litigation on the FWS's listing decision makes this case an unsuitable vehicle for addressing the constitutionality of Section 9 of the ESA, 16 U.S.C. 1538, which directly addresses private conduct.

Compl. para. 5. Petitioners' affidavits in support of their claim of standing likewise emphasized the potential impact of the challenged listing decision on their commercial activities. See Pet. App. C7-C10. In holding that petitioners had standing to sue, the court of appeals explained that "Coalition members operate their businesses subject to federal licenses and permits"; that "portions of the members' licensed or permitted activities take place in historical Alabama sturgeon habitat"; and that the listing of the Alabama sturgeon "adds another layer of concrete economic considerations that may be in tension with the members' pre-listing assumptions." *Id.* at C16.

Thus, if petitioners had challenged the application of the ESA's "take" prohibition to their own conduct, the commercial character of their activities would have rendered their suit readily distinguishable from *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), and would have compelled rejection of their constitutional claim. Compare *Morrison*, 529 U.S. at 611 (explaining that, in those two cases, "neither the actors nor their conduct ha[d] a commercial character") (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)). The susceptibility of petitioners' conduct to federal regulation is particularly clear because the activities in question are conducted on, and directly affect, navigable waters within the United States. See *Lopez*, 514 U.S. at 558 (identifying, as one of the "three broad categories of activity that Congress may regulate under its commerce power," the "use of the channels of interstate commerce"). In holding that petitioners had standing to sue, the court of appeals observed that "Coalition members operate their businesses subject to federal licenses and permits."

Pet. App. C16. The fact that petitioners' operations are subject to other, uncontested federal permitting regimes reinforces the conclusion that those operations are not beyond the reach of federal control.

Petitioners could not avoid the ESA's application to their own conduct by arguing that the statutory prohibition on "takes" of Alabama sturgeon would be unconstitutional as applied to hypothetical non-commercial activities. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). In *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004) (*Rancho Viejo*), the court of appeals applied that principle to the ESA, holding that Section 9 of the Act was constitutional as applied to a commercial development project that caused "takes" of listed species, while declining to address the developer's contention that the provision would be unconstitutional as applied to non-commercial conduct. *Id.* at 1077-1078; cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (holding that 18 U.S.C. 666(a)(1)(B) is constitutional as applied to a bribery offense that threatens the integrity of the relevant federal program, and affirming the defendant's conviction on that basis, without addressing the constitutionality of other potential applications of the statute).[4]

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[4] The ESA contains an express congressional finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C.

Consideration of petitioners' own conduct is especially appropriate because petitioners have not sought facial invalidation of the "take" prohibition or of any other ESA provision, but have instead limited their challenge to the listing of a single species. Petitioners emphasize that the Alabama sturgeon "is found in only one state and has no commercial use." Pet. 29. In light of petitioners' decision to frame their suit as an as-applied challenge, it is particularly appropriate for this Court to take into account the nature of petitioners' own activities, which are commercial in character and occur on navigable waters within the United States. See *Rancho Viejo*, 323 F.3d at 1077 (explaining that the plaintiff developer's effort to limit the court's inquiry to a single listed species allegedly lacking in commercial value, without reference to the commercial nature of the developer's own activities, was "simply the plaintiff's attempt to have its cake and eat it too").[5]

1531(a)(1). And, as an empirical matter, it appears to be undisputed that "the majority of takes would result from economic activity." *GDF Realty*, 326 F.3d at 639; see *Rancho Viejo*, 323 F.3d at 1078 (endorsing the government's representation that "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities"). Facial invalidation of the "take" prohibition based on its potential applicability to non-commercial conduct would be particularly inappropriate in light of the consistently commercial nature of the activities to which the provision has actually been applied. Compare *United States* v. *Raines*, 362 U.S. 17, 23 (1960) (suggesting that facial invalidation may be appropriate where a statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover").

[5] Even if the as-applied inquiry appropriately focused on the Alabama sturgeon itself, rather than on the human activities that the FWS's listing decision may impact, petitioners' constitutional challenge

3. For the foregoing reasons, petitioners are wrong in arguing that the ESA's application to the Alabama sturgeon involves purely non-commercial conduct. Even if that characterization were correct, however, petitioners' constitutional challenge would lack merit.

a. As the court of appeals explained, the international market in illegally taken wildlife is estimated at between $5 billion and $8 billion annually. Pet. App. A41-A42. The court of appeals also noted the FWS's estimate that Americans pay $200 million annually for illegally taken domestic wildlife and $1 billion annually for wildlife taken abroad. *Id.* at A42. Consistent with the rulings of other courts of appeals, the Eleventh Circuit correctly concluded that the ESA "is a general regulatory statute bearing a substantial relation to commerce." *Id.* at A41; accord *GDF Realty*, 326 F.3d at 640 (stating that the "ESA's take provision is economic in nature and supported by Congressional findings to that

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would lack merit. The Alabama sturgeon was formerly harvested for commercial purposes, see 65 Fed. Reg. at 26,439 (explaining that "the 1898 commercial catch [of Alabama sturgeon] consisted of approximately 20,000 fish"), and the ESA's protections "may one day allow the replenishment of its numbers and eventual, controlled, commercial exploitation of the fish," Pet. App. A46. See S. Rep. No. 526, 91st Cong., 1st Sess. 3 (1969) (explaining that the protection of an endangered species "may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed," so that "businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels"); pp. 15-16, *infra*. In addition, the habitat of the Alabama sturgeon is located entirely within navigable waters. See 65 Fed. Reg. at 26,441 (stating that "the species is known to survive only in the Alabama River channel below Millers Ferry Lock and Dam"). Those facts make the Alabama sturgeon a particularly unlikely candidate for a species that is beyond the reach of federal protection.

effect"); *Gibbs* v. *Babbitt*, 214 F.3d 483, 496 (4th Cir. 2000) ("Given the existing economic and commercial activity involving * * * wildlife generally, Congress could find that conservation of endangered species and economic growth are mutually reinforcing."), cert. denied, 531 U.S. 1145 (2001).

As the court of appeals explained, moreover, the potential economic significance of endangered species extends well beyond commercial traffic in wildlife. See Pet. App. A42-A44. The court observed that "[n]ine of the ten most commonly used prescription drugs in the United States are derived from natural plant products," *id.* at A42; that "[g]enetic diversity is also important to improving agriculture and aquaculture," *ibid.*; and that "[a] species' simple presence in its natural habitat may stimulate commerce by encouraging fishing, hunting, and tourism," *id.* at A43. In the aggregate, protection of listed species therefore can be expected to produce substantial economic benefits.

b. Petitioners do not contest the overall economic significance of the protections that the ESA provides to listed species generally. Rather, they contend that the Act is unconstitutional as applied to the Alabama sturgeon because that fish is "found in only one state and has no commercial use." Pet. 29. This Court's analysis in *Raich* is equally apposite here:

> [Petitioners] ask [the Court] to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that where the class of activities is regulated and that class is within the reach of federal power,

> the courts have no power to excise, as trivial, individual instances of the class.

545 U.S. at 23 (citations, brackets, and internal quotation marks omitted). Under *Raich*, the ESA's application to intrastate species having no current commercial use must be sustained if Congress had a "rational basis" (*id.* at 22) for concluding that the exclusion of such species from the Act's protections would significantly impair Congress's ability to achieve its commerce-related objectives.

As the court of appeals explained, see Pet. App. A44-A49, Congress had sound reasons for declining to limit the ESA's coverage in the manner that petitioners advocate. Some listed species (including the Alabama sturgeon) were once commercially exploited, and the protections of the Act may regenerate such species to the point that commercial uses again become feasible. See *id.* at A46; note 5, *supra*; *Gibbs*, 214 F.3d at 496 (explaining that protection of the endangered red wolf could lead to a restoration of the trade in red wolf pelts if the species' numbers increased); *United States* v. *Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996) (upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, and explaining that "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity").[6] Ex-

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[6] As this Court has recognized, Congress may act to protect assets that were previously used in interstate commerce, but presently are not, on the theory that such protection may facilitate future commercial activity. In *Preseault* v. *ICC*, 494 U.S. 1 (1990), this Court upheld the National Trails System Act, 16 U.S.C. 1241 *et seq.*, which provided for conversion of unused railroad lines to trails in order to preserve the right-of-ways for possible reconversion to railroad purposes, as a valid exercise of Commerce Clause authority. The Court explained that Con-

cluding species with no *current* commercial uses from the ESA's protections would substantially frustrate that endeavor. When it enacted the ESA, moreover, "Congress was concerned with 'the *unknown* uses that endangered species might have.'" Pet. App. A44 (emphasis added) (quoting *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978)). "Because Congress could not anticipate which species might have undiscovered scientific and economic value, it made sense to protect all those species that are endangered." *Id.* at A45.

4. The courts of appeals that have considered the question have uniformly sustained the constitutionality of the "take" prohibition contained in Section 9 of the ESA. See *GDF Realty*, 326 F.3d at 627-641; *Rancho Viejo*, 323 F.3d at 1066-1080; *Gibbs*, 214 F.3d at 490-506.[7] As petitioners acknowledge (Pet. 9), this Court has repeatedly denied review of those holdings. Because the courts of appeals have uniformly rejected Commerce Clause attacks on the ESA, because petitioners' constitutional challenge to the *listing* of the Ala-

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gress could rationally conclude "that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." *Preseault*, 494 U.S. at 19.

[7] Although petitioners do not contend that any court has invalidated Section 9 or any other ESA provision, either on its face or as applied, they note that the Fifth Circuit in *GDF Realty* and the District of Columbia Circuit in *Rancho Viejo* relied on different rationales in sustaining the ESA against constitutional attack. Pet. 13. This Court, however, "reviews judgments, not statements in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827). The Court denied petitions for certiorari in both *GDF Realty* and *Rancho Viejo*, and there is no reason for a different result here.

bama sturgeon is insubstantial (see pp. 7-8, *supra*), and because petitioners' own conduct is commercial in character and occurs on navigable waters (see pp. 9-11, *supra*), review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the
Supreme Court of the United States

ALABAMA-TOMBIGBEE
RIVERS COALITION, ET AL.,

Petitioners,

v.

DIRK KEMPTHORNE, SECRETARY
OF THE INTERIOR, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT

I

REVIEW IS WARRANTED TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW

If the Constitution is to act as a constraint on federal authority, if the commerce power has any limitations whatsoever, then it is incumbent on this Court to say so in this case. Under cover of the Commerce Clause, the Eleventh Circuit effectively held Congress could exercise complete federal control over all land and water resources, both public and private, to protect the "biodiversity" of species and their "ecosystems." Pet. App. A42-A43, A45-A46. But there is no rational basis upon which Congress could conclude that the regulation of an intrastate, noncommercial species—like the Alabama sturgeon in this case—could have sufficient ties to interstate commerce to justify regulation under the Commerce Clause within the permissible scope defined by this Court.

If Congress can pass laws under the commerce power regulating any activity that affects protected species, there is no human endeavor beyond federal control. This cannot be squared with this Court's Commerce Clause decisions or the Constitution. *See GDF Realty Inv., Ltd. v. Norton*, 362 F.3d 286, 291-292 (5th Cir. 2004) (dissent to the denial of rehearing en banc). It is axiomatic "that the Commerce Clause regulates commerce, not ecosystems." *Id.* at 292.

This Court has recognized that otherwise constitutional enactments may be invalid in some applications but this Court has never applied its

Commerce Clause analysis to the Endangered Species Act. It should do so now. "[M]any applications of the ESA may be constitutional, but this one [the regulation of an intrastate, noncommercial species] simply goes too far." *Id.* at 293.

II

REVIEW IS WARRANTED TO ADDRESS A CONFLICT AMONG THE CIRCUITS

If ensuring constitutional safeguards are not sufficient in themselves to warrant review by this court, there are other reasons. Petitioners, and more extensively amici, have already observed that as to the ESA the circuits have adopted irreconcilable rationales in support of a limitless commerce power.

In his dissent to the denial of rehearing en banc in *Rancho Viejo, LLC v. Norton*, 334 F.3d. 1158 (D.C. Cir. 2003), then Judge Roberts noted the panel opinion "in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so." *Id.* at 1160. This focused the court on Rancho Viejo's commercial development rather than on the incidental taking of arroyo toads—an approach seemingly "inconsistent with the Supreme Court's holdings in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed.2d 626 (1995), and *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed.2d 658 (2000)." As the judge observed, this rationale would have lead to a different result in those cases and was at odds with the Fifth Circuit in *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 634-635 (5th Cir. 2003): "As the Fifth Circuit explained, 'looking primarily beyond the regulated activity . . . would "effectually

obliterate" the limiting purpose of the Commerce Clause,' and, under such an approach, 'the facial challenges in *Lopez* and *Morrison* would have failed.'" *Rancho Viejo,* 334 F.3d at 1160. That approach "conflicts with the opinion of a sister circuit"—the Fifth Circuit in *GDF Realty. Id.*

Of course, the conflict is much more pervasive than those two cases. After an extensive examination of the circuit court decisions that have addressed Commerce Clause challenges to various applications of the ESA, amici identified numerous conflicts. The Fourth Circuit in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), focused on the *regulated* species, the Fifth Circuit in *GDF Realty* on all species, and the D.C. Circuit in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) and *Rancho Viejo*,on the *actor*. *See* Amici Brief National Water Resources Association, et al., in Support of Petition at 20. In this case the Eleventh Circuit employed the "biodiversity" and "ecosystem" approach used by the Fifth Circuit in *GDF Realty* and the D.C. Circuit in *NAHB*. *Id.* at 21. But that decision conflicts with the decisions in *Gibbs* and *Rancho Viejo* which focused, respectively, on the commercial effects of the regulated species and the commercial activities of the actor. *Id.*

These conflicts among the circuits on such a question of national importance—the constitutionality of regulating for the protection of intrastate, noncommercial species—provides an independent basis for granting the writ of certiorari in this case.

III

REVIEW IS WARRANTED TO ADDRESS THE GOVERNMENT'S INABILITY TO ARTICULATE A CONSISTENT CONSTITUTIONAL BASIS FOR REGULATING THE ALABAMA STURGEON

Aside from the conflict among the circuits, another independent basis for review is provided by the government itself. The government opposition floats at least seven different theories for upholding the ESA against the Commerce Clause challenge in this case. They include: (1) that Congress may regulate an agency's own actions, Opp. at 7; (2) that Congress can regulate Petitioners' own commercial activities, Opp. at 9; (3) that Congress has authority to regulate activities in navigable waters as channels of commerce, Opp. at 10; (4) that regulation of the Alabama sturgeon is appropriate because the fish may become commercially viable in the future, Opp. at n. 5; (5) that in the aggregate, protection of listed species can have a substantial economic effect, Opp. at 13-14; (6) that this Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), supports the decision below, Opp. at 15-16; and (7) that the courts of appeals have uniformly sustained the constitutionality of the "take" prohibition of the ESA, Opp. at 16-17.

Standing alone, the inability of the government to articulate a consistent constitutional theory for regulating intrastate, noncommercial species generally, and the Alabama sturgeon in particular, warrants review by this Court. If neither Congress, nor the lower courts, nor the Executive Branch, can identify the source of federal power for the most

far-reaching environmental law in the Nation's history, this Court must act to resolve the question.

1. The Regulation of Government Activity Is Not Enough to Sustain the Listing of the Alabama Sturgeon

The government's leading argument in its opposition is that even if the listing of the Alabama sturgeon as an endangered species is unconstitutional under the Commerce Clause, "Congress has ample constitutional authority to direct Executive Branch agencies to conduct their *own* activities in ways that are protective of listed species." Opp. at 7. Whether that authority is sufficient in this case was not addressed below. The government never argued below, as here, that the Spending and Property Clauses support ESA regulation. Below, the government relied on the Armed Forces Clause—an argument it subsequently abandoned and which "was not preserved." Opp. at n.3.

Although no response to this argument is required, because the issue is not properly before the Court, it suffices to say that the listing of the Alabama sturgeon does not implicate only federal action. When a species is listed, private conduct is automatically controlled through the Section 9 "take" prohibition, the Section 10 permit requirement, and the Section 7 mitigation standards, as well as other provisions of the Act. The argument that Congress can direct *federal* action, and therefore list species so as to direct *private* action, is simply inadequate to respond to Petitioners' constitutional challenge. The government was prudent in abandoning the argument below.

2. The Purported Regulation of Petitioners' Commercial Activity Is Not Enough to Sustain the Listing of the Alabama Sturgeon

The government claims Petitioners' own commercial activities are well within Congress' authority to regulate under the ESA.[1] Opp. at 9. But the government misses the lessons of *Lopez* and *Morrison*. Those cases turned on whether the challenged provision purported to regulate *economic* activity, by its own terms. In those cases, as in this, they did not. Therefore, this Court determined the Gun Free School Zones Act and the Violence Against Women Act were not enacted in furtherance of the commerce power.

In this case, Petitioners challenge the listing of the Alabama sturgeon. But the listing provision by its own terms excludes a consideration of the economic effects of the species, requiring instead that the Secretary make listing determinations solely on the basis of the biological status of the species. *See* 16 U.S.C. § 1533(b)(1)(A). Therefore, Petitioners' commercial activities, while relevant to standing, are irrelevant to the listing determination and to the constitutional challenge in this case.

The problem with the listing process, as we learn from *Lopez* and *Morrison*, is that the listing provision "has no express jurisdictional element which might

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[1] This position is inconsistent with the claims of the U.S. Fish and Wildlife Service in the final rule that the listing of the Alabama sturgeon would have virtually no impact on in-stream commercial activities. *See* 65 Fed. Reg. 26438, 26450, 26458, and 26460-61 (May 5, 2000).

limit its reach to a discrete set of [activities that] have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562.

3. The ESA Does Not Purport to Regulate Channels of Interstate Commerce

The government asserts it can regulate Petitioner's conduct in the sturgeon's habitat—a navigable water—as a channel of interstate commerce. Opp. at 10. But the fallacy in this argument is self-evident; the ESA does not purport to regulate the "use of the channels of interstate commerce." That fact is as determinative here as it was in *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 558. Every court to consider the matter has determined the ESA must be sustained, if at all, as a regulation of activity that "substantially affects" interstate commerce. Indeed, the circuit conflict derives from the differing rationales employed in applying the "substantial effects" test to the constitutional question.

4. Speculative Commercial Effects Are Not Enough to Sustain the Listing of the Alabama Sturgeon

The government argues Congress can apply the commerce power to regulate the Alabama sturgeon in anticipation of a future sturgeon market.[2] Opp. at n.5.

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[2] The government overstates the Alabama sturgeon's historical uses. The only possible record evidence of any commercial catch of the Alabama sturgeon dates back to 1898. *see* 65 Fed. Reg. at 26439, but that report did not specify if the "sturgeon" catch included the Alabama sturgeon. Also, the Fish and Wildlife Service conceded below that the Alabama sturgeon was not a (continued...)

Although some lower court judges have advanced this theory, it borders on the absurd. This Court has never upheld a Commerce Clause enactment based on a speculative, future market. *See Jones v. United States*, 529 U.S. 848, 859 (2000) (interpreting a federal arson statute to cover "only property *currently* used in commerce," where a contrary interpretation would have raised serious constitutional problems under *Lopez*) (emphasis added).

Moreover, this approach is the quintessential example of federal regulation without limits. A future market can be conceived for any tangible object, including leaves or rocks, if only among collectors. The theory that Congress can regulate activity now to ensure the *possibility* of a market in the uncertain future has no basis in constitutional law.

5. Under *Lopez* and *Morrison* Only Economic Activity May Be Aggregated

The government maintains that the commercial effects of all species may be aggregated to find a substantial effect on interstate commerce. Opp. at 14. But this is also contrary to *Lopez* and *Morrison*. In *Lopez* this Court held the Gun Free School Zones Act was a criminal statute that by its terms had nothing to do with "commerce" or any sort of economic enterprise and that Section 922(q) was not an essential part of a larger regulation of economic activity. *See Lopez*, 514 U.S. at 560. Therefore, this Court concluded the provision could not "be sustained under our cases

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[2] (...continued)
commercial source of caviar.

upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.*

This rule of law is equally applicable here; the listing provision of the ESA "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *See id.* Nor is it "an essential part of a larger regulation of economic activity." *See id.* Therefore, the listing of the Alabama sturgeon cannot be based on its aggregate effect with all other species.

6. This Court's Decision in *Raich* Is Inapplicable

Contrary to the government's assertion, Opp. at 15, this Court's decision in *Raich* is not applicable to this case. *See* Petition at 27-29. In summary, the ESA is not an economic market scheme like the Controlled Substances Act in *Raich* which covered the entire market in drugs. The ESA is a conservation statute that does not purport to regulate any market. Therefore, it is not an economic regulatory scheme and the listing of the Alabama sturgeon is not a trivial instance of a class of economic regulation that can be upheld based on its substantial effects on interstate commerce.

7. Lower Court Decisions Upholding the ESA Against Constitutional Challenge Have Been Anything but Uniform

The government's statement that the "courts of appeal that have considered the question have uniformly sustained the constitutionality of the 'take' prohibition contained in Section 9 of the ESA," Opp. at

16-17, is misleading and begs the question. Petitioners do not challenge the "take" prohibition challenged in other cases. This is the first time this Court has been asked to address the application of the ESA to a listing decision. In addition, as noted above, the circuits have been unable to agree on a uniform constitutional rationale that would protect the ESA from constitutional challenge. And in this litigation the government has been unable to articulate any consistent basis for listing intrastate, noncommercial species. It is this very lack of uniformity that calls for resolution by this Court.

CONCLUSION

For the forgoing reasons review should be granted.

DATED: November, 2007.

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In The

Supreme Court of the United States

ALABAMA-TOMBIGBEE RIVERS COALITION, et al.,

Petitioners,

v.

DIRK KEMPTHORNE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICI CURIAE BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION AND WESTLANDS WATER DISTRICT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The *amici* are as follows:

The National Water Resources Association (NWRA) is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in water quantity and quality issues in the western states. The NWRA includes some of the nation's largest water districts, including the Central Arizona Water Conservation District (Arizona), Colorado River Water Conservation District (Colorado), Middle Rio Grande Conservancy District (New Mexico), and Las Vegas Valley Water District (Nevada).

The Westlands Water District (WWD), located in Fresno and King Counties, California, is the nation's largest agricultural water district in terms of irrigated acreage. WWD provides irrigation water to farmers located in its service area, as well as water to cities and towns, industries, residential users and others located in its service area.

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution to its preparation or submission. No person other than *amici*, or their members or counsel, made such a monetary contribution.

The *amici* are, or represent, water districts and agencies that provide water supplies for urban, agricultural and industrial uses and power generation in the western states. They acquire most or all of their water supplies from federal, state and local water projects, pursuant to contracts entered into with the agencies that operate the projects. The Eleventh Circuit decision below holds that the Endangered Species Act (ESA) authorizes and mandates the U.S. Fish and Wildlife Service to list a species – in this case, the Alabama sturgeon – as endangered, even though the species is found in a single state and does not have interstate commercial effects. The listing of an endangered species under the ESA triggers various statutory requirements and prohibitions, principally that a federal agency may not take action that "jeopardize[s]" a listed species, 16 U.S.C. § 1536(a)(2), and that no person may "take" a listed species, *id.* at § 1538(a)(1)(B). Under the Eleventh Circuit's construction, the water projects that supply water to the *amici* may be prohibited from delivering the full amount of the contracted-for supplies if this would affect an intrastate, non-commercial species, because such deliveries would violate either the "jeopardy" or "take" prohibitions of the statute. This statutory construction would impair the *amici*'s rights to receive water supplies from the projects. Indeed, as this brief will explain, a federal district court in California recently ordered the federal and state water projects in California, which provide most of California's water supplies for urban and agricultural users, to substantially reduce their water deliveries

in order to benefit a listed endangered species found solely in California and that does not have interstate commercial effects. Thus, the question presented here substantially, and directly, affects the rights and interests of the *amici*.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES AN IMPORTANT ISSUE CONCERNING THE SCOPE OF THE FEDERAL COMMERCE POWER.

This case raises an important question concerning the scope of Congress' powers under the Constitution's Commerce Clause. The question is whether the Endangered Species Act (ESA) is constitutional as applied to an intrastate endangered species that does not have interstate commercial effects. The case presents an "as applied" challenge to the ESA's constitutionality, not a facial challenge. This Court has never decided this significant constitutional issue. The decision below conflicts with this Court's recent decisions defining the scope of Congress' commerce powers. Therefore, this Court should review the lower decision and resolve the constitutional issue. *See* Supreme Court Rule 10(c).

A. The Federal Commerce Power: *Lopez*, *Morrison* and *Raich*

As this Court has often held, the Constitution delegates specific powers to the federal government

and reserves to the states the powers not delegated. *United States v. Lopez*, 514 U.S. 549, 552 (1995). The federal government's delegated powers include the power, delegated by the Commerce Clause, to regulate commerce among the states. U.S. Const., Art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 552-559; *Gibbons v. Ogden*, 22 U.S. 1 (1824). Under this Court's modern jurisprudence, the Commerce Clause authorizes Congress to regulate the channels and instrumentalities of interstate commerce, and also activities that substantially affect interstate commerce. *Lopez,* 514 U.S. at 558-559; *United States v. Morrison,* 529 U.S. 598, 608-609 (2000); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). This case, like most recent cases involving interpretations of the federal commerce power, addresses whether the regulated activity substantially affects interstate commerce.

This Court has in its history invalidated several congressional enactments on grounds that the regulated activities did not substantially affect interstate commerce and Congress had thus exceeded its commerce powers. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 545-548 (1935); *Adair v. United States*, 208 U.S. 161 (1908). From the mid-1930s to the mid-1990s, however, this Court consistently sustained Congress' exercise of its commerce powers, and deferred to Congress' judgment that the regulated activity affected interstate commerce. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones &*

Laughlin Steel Corp., 301 U.S. 1 (1937). In *Wickard*, this Court adopted the aggregation principle in sustaining the congressional regulation; this principle holds that Congress may regulate an entire class of producers whose collective product substantially affects interstate commerce, even though the production of individual class members may not have this effect. *Wickard*, 317 U.S. at 127-128. As this Court has stated, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Raich*, 545 U.S. at 17, *quoting from Lopez*, 514 U.S. at 558, *quoting from Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27 (1968).

In two recent decisions, however, this Court made clear that Congress' commerce power, although broad, is not unlimited, and that Congress may not freely legislate in areas traditionally regulated by the states. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). In *Lopez*, the Court invalidated a federal statute prohibiting the possession of guns near schools, on the ground that the regulated activity did not substantially affect interstate commerce. In *Morrison,* the Court invalidated a federal statute providing a remedy for gender-based acts of violence on the same ground.

The *Lopez* and *Morrison* decisions established several important principles governing the scope of the federal commerce power. First, the commerce power applies to activities that substantially affect

interstate "commerce," and "commerce" denotes economic activity. *Lopez,* 514 U.S. at 559, 560-561 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *Morrison*, 529 U.S. at 610-611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.") Second, the congressional regulation must have a "jurisdictional element" that limits the regulation to specific activities affecting interstate commerce; this allows the courts to determine on a case-by-case basis whether the specific regulated activity affects such commerce. *Lopez,* 514 U.S. at 561-562; *Morrison*, 529 U.S. at 611-612. Third, although congressional findings are relevant in determining whether the regulated activity affects interstate commerce, such findings are not entitled to weight if Congress employs a different standard from the "substantially affects" test developed by this Court. *Lopez,* 514 U.S. at 562-563; *Morrison*, 529 U.S. at 612, 614-616. Finally, the link between the congressional regulation and interstate commerce must be substantial and not attenuated; if the link is attenuated, Congress' power to regulate would have no logical stopping point, and Congress would possess the equivalent of the general police power retained by the states. *Lopez,* 514 U.S. at 563-568; *Morrison,* 529 U.S. at 612-613. The ultimate test of the statute's constitutionality is whether the regulated activity affects national or local interests; "[t]he Constitution

requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 618-619.

The *Lopez* and *Morrison* decisions also limited *Wickard*'s aggregation principle, stating that the principle generally applies only to regulation of *economic* activity. *Morrison,* 529 U.S. at 613 (although the Court need not adopt a "categorical rule against aggregating the effects of any noneconomic activity," "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.") The *Lopez* and *Morrison* decisions declined to apply the aggregation principle because, as stated in *Lopez,* the criminal statute in that case was "not part of a larger regulation of *economic* activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." 514 U.S. at 561 (emphasis added). Thus, the decisions hold that aggregation is permissible if failure to aggregate would undermine a broad congressional scheme regulating economic activity.

In *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court sustained the constitutionality of another criminal statute, the Controlled Substances Act, as applied to the use of marijuana for medicinal purposes. The Court upheld the statute because the regulated activity – the marketing of drugs – is "quintessentially economic," in that it involves the "production, distribution, and consumption of commodities." *Raich,* 545 U.S. at 25. *Raich* distinguished

Lopez and *Morrison* on grounds that those cases, unlike *Raich*, did not involve the regulation of economic activity. *Id.* Applying the *Wickard* aggregation principle, *Raich* held that Congress had adopted a comprehensive scheme regulating the interstate marketing of drugs, and the use of marijuana for medicinal purposes was "an essential part of the larger regulatory scheme"; although marijuana use for medicinal purposes may be a "separate and distinct class" of activity that has no interstate commercial effects, Congress may regulate that separate activity as part of its comprehensive regulation of the interstate marketing of drugs. *Id.* at 26-27. Thus, *Raich* sustained the congressional regulation by aggregating the regulated activities, just as *Wickard* had done. *Id.* at 25. Indeed, *Raich* observed that "[t]he similarities between this case and Wickard are striking." *Id.* at 18.

Raich is compatible with *Lopez* and *Morrison* because *Raich* involved the regulation of economic activity and *Lopez* and *Morrison* did not. Because of this difference, *Raich* aggregated the regulated activity and upheld the regulation, while *Lopez* and *Morrison* declined to aggregate the activity and struck down the regulations. These decisions make clear that otherwise local activities can be aggregated, and regulated, under the Commerce Clause if they are economic rather than non-economic in nature.

B. Applicability of Federal Commerce Power To Endangered Species Act

This Court has never applied its Commerce Clause jurisprudence – particularly as developed in *Lopez, Morrison* and *Raich* – to determine the constitutionality of a federal environmental statute that was adopted for conservation purposes rather than to regulate economic activity.[2] This case directly raises this unresolved constitutional issue. The question is whether the ESA, which was enacted to preserve species from extinction rather than for an economic purpose, is within the congressional commerce power as applied to intrastate species that have no commercial effects. Stated differently, the question is whether the Commerce Clause – which authorizes regulation of "commerce" among the states – sustains congressional regulation of species that do not affect such commerce. The question may turn on whether *Wickard*'s aggregation principle, which applies to economic regulation, extends to non-economic regulation, such as the ESA. These significant constitutional issues are worthy of this Court's review.

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[2] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), this Court upheld the constitutionality of the Surface Mining Control and Reclamation Act, which regulated the commercial activity of surface mining. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-174 (2001), this Court declined to reach a constitutional challenge to the Army Corps of Engineers' jurisdiction to regulate "isolated" wetlands, holding instead that the Clean Water Act does not authorize such regulation.

In the case below, the Eleventh Circuit held that the ESA is constitutional as applied to the endangered Alabama sturgeon because this species is part of the "genetic diversity," or "biodiversity," that includes all species, and all species form part of different "ecosystems." Pet. App. A42-A43, A45-A46. The court determined that all species, taken together, have commercial value, because they provide benefits to medicine as well as agriculture and aquaculture. *Id.* at A42. The court also concluded that some endangered species – potentially including the Alabama sturgeon, which at one time was commercially harvestable, *id.* at A46 – have distinct commercial benefits by encouraging tourism, fishing and hunting. *Id.* at A43. The court concluded that it is appropriate to "aggregate" all endangered species for Commerce Clause purposes – even species that do not affect interstate commerce – because Congress regulated all such species as part of a comprehensive system of regulation. *Id.* at A44.

The Eleventh Circuit's decision is not consistent with the Commerce Clause principles developed in *Lopez*, *Morrison* and *Raich*. As noted above, *Lopez* and *Morrison* held that the federal commerce power applies to activities that substantially affect interstate "commerce," and that commerce denotes "economic" activity. *Lopez,* 514 U.S. at 560-561; *Morrison,* 529 U.S. at 610-611. Although some, and perhaps many, endangered species may affect interstate commerce – such as by promoting tourism, hunting, and fishing – many endangered species do not have

these effects. Thus, the Commerce Clause does not authorize regulation of all endangered species regardless of their interstate commercial effects, contrary to the Eleventh Circuit decision. To be sure, *Lopez*, *Morrison* and *Raich* held that economic activities can be aggregated under the Commerce Clause (and *Raich* aggregated the economic activities in that case), but the decisions made clear that aggregation applies to economic but not non-economic regulation – and the ESA is a form of non-economic regulation. The Eleventh Circuit decision extends the aggregation principle – and Commerce Clause regulation – beyond the bounds recognized in *Lopez*, *Morrison* and *Raich*. The decision creates an open-ended federal commerce power, one that has no logical stopping point. *Lopez* and *Morrison* plainly held that the Commerce Clause does not extend this far.

The Commerce Clause principles described in *Lopez* and *Morrison*, as well as *Raich*, recognize that our constitutional system of federalism is based on a division, and hence a balance, of sovereign national power between the federal government and the states. As Justice Kennedy has observed, "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one," and "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Lopez,* 514 U.S. at 576 (Kennedy, J., concurring). The

"substantially affects" test applicable under the Commerce Clause effectuates the constitutional balance of power, by limiting the federal government's power to regulate activities traditionally regulated by the states. Indeed, this Court has adopted analogous balancing tests in construing federal environmental statutes, such as the Clean Water Act, in part to avoid the constitutional issue of whether Congress may regulate land and water uses traditionally regulated by the states. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-174 (2001) (holding that Army Corps of Engineers does not have jurisdiction under Clean Water Act to regulate non-navigable waters unless they have "significant nexus" to navigable waters, and that contrary interpretation would result in "significant impingement of the States' traditional and primary authority over land and water use" and would "significantly change[] the federal-state balance"); *Rapanos v. United States*, 126 S.Ct. 2208, 2236 (2006) (Kennedy, J., concurring) (applying same "significant nexus" test in determining whether Army Corps of Engineers has jurisdiction to regulate non-navigable wetlands). The Eleventh Circuit decision, on the other hand, is devoid of any balancing of federal and state powers, and concludes simply that Congress may regulate all endangered species in all circumstances regardless of whether they have interstate commercial effects. The decision is plainly inconsistent with the Commerce Clause principles developed in *Lopez*, *Morrison* and *Raich*.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE FEDERAL CIRCUIT COURTS REGARDING THE PROPER CONSTITUTIONAL RATIONALE FOR THE ISSUE PRESENTED HERE.

Prior to this case, four federal circuit courts have addressed the ESA's constitutionality as applied to individual endangered species, and all four courts upheld the ESA's constitutionality as applied and this Court denied review of all four cases. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *rehearing en banc denied*, 334 F.3d 1158, *cert. denied*, 540 U.S. 1218 (2004); *GDF Realty, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *rehearing en banc denied*, 362 F.3d 286 (2004), *cert. denied*, 545 U.S. 1114 (2005). The circuit court decisions, however, adopted conflicting constitutional rationales to support their conclusions, and these conflicting rationales would lead to different outcomes of the same case. Moreover, vigorous dissenting opinions were filed in all four cases, dissenting either from the panel decision or the decision denying rehearing *en banc*, thus signaling the disagreement among the circuit court judges concerning this constitutional issue. This Court should review this case to resolve the conflict among the circuit courts regarding the proper constitutional rationale, and to otherwise

resolve this important and contentious constitutional issue. *See* Supreme Court Rule 10(a).

Indeed, then-Judge Roberts, while sitting on the District of Columbia Court of Appeals, dissented from the denial of rehearing *en banc* in one of these cases on the ground that *en banc* review was necessary to resolve the intercircuit conflict regarding the proper constitutional rationale. *Rancho Viejo, rehearing en banc denied*, 334 F.3d 1158, 1160 (Roberts, J., dissenting). He argued that "[e]n banc review is appropriate because the approach of the panel in this case and *NAHB* [*National Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)] now conflicts with the opinion of a sister circuit [*GDF Realty Investors, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003)] – a fact confirmed by that circuit's quotation from the *NAHB* dissent." *Id.* Thus, then-Judge Roberts perceived a "conflict[]" among the circuit courts on the constitutional issue raised here, which of course is not only a ground for rehearing *en banc* but also a ground for review by this Court.[3]

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[3] Under Supreme Court Rule 10(a), the Court may review a circuit court decision that is in "conflict" with another circuit court decision "on the same important matter." Then-Judge Roberts' dissenting opinion indicates that an intercircuit "conflict" may exist when the circuit courts – although agreeing on the outcome of a constitutional issue – adopt conflicting rationales to support the outcome.

A. Circuit Court Decisions Addressing ESA's Constitutionality

The four circuit court decisions addressing the ESA's constitutionality are as follows:

1. *National Ass'n of Home Builders v. Babbitt ("NAHB")*, 130 F.3d 1041 (D.C. Cir. 1997)

The District of Columbia Circuit, in a 2-1 panel decision, held that the ESA is constitutional as applied to the taking of the Delhi Sands Flowering-Loving Fly. The three judges, unable to agree on a conclusion or rationale, wrote three separate opinions. Judge Wald wrote that the ESA is constitutional as applied because it regulates the "channels" of interstate commerce; endangered species are part of "biodiversity"; endangered species may lead to important medical discoveries; and Congress adopted findings describing the importance of endangered species in maintaining our "ecosystem." 130 F.3d at 1043-1057. Judge Henderson disagreed with many of Judge Wald's conclusions, particularly those involving the "channels" of interstate commerce and the possibility of medical discoveries, and stated that it is "impossible to ascertain" whether endangered species will lead to medical discoveries. *Id.* at 1057-1060. She argued, however, that the ESA is constitutional as applied because there is an "interconnection of the various species and ecosystems" and "the extinction of one species affects others and their ecosystems." *Id.* Judge Sentelle, dissenting, argued that the ESA is

unconstitutional as applied because "the Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems'" and the ESA does not regulate "commerce." *Id.* at 1060-1067.

2. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000)

The Fourth Circuit, in a 2-1 panel decision, held that the ESA is constitutional as applied to the taking of red wolves. The majority decision upheld the ESA's constitutionality because the wolves affect interstate commerce – they provide the basis for tourism, scientific research, and commercial pelt trade. 214 F.3d at 492. The decision also held that since the wolves generally involved economic activity, the taking of individual wolves can be aggregated under *Wickard*. *Id.* at 493. Thus, the decision upheld the ESA's constitutionality because of the commercial nature of the regulated species, not, as in *NAHB*, because of the "biodiversity" of all species. Judge Luttig, dissenting, argued that the ESA is unconstitutional as applied because the taking of the wolves does not constitute "economic activity," and the regulation "implicates but a handful of animals, if even that, in one small region of one state." *Id.* at 506.

3. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003)

The District of Columbia Circuit held that the ESA was constitutional as applied to the taking of the

arroyo toad. The court reasoned that the ESA regulates the *actor* who takes the species – often a developer engaged in commercial activity – and does not regulate the *species* itself; "[t]he ESA," the court stated, "regulates takings, not toads." 323 F.3d at 1073. The court adopted an entirely different rationale than *NAHB* and *Gibbs*, by considering whether the actor is engaged in interstate commerce rather than whether the species affects such commerce.

The court denied rehearing *en banc*, with two judges dissenting. 334 F.3d 1158 (2003). One of the dissenting judges, then-Judge Roberts, asserted that the majority opinion "in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so." *Id.* at 1160 (Roberts, J., dissenting) (original emphasis). Then-Judge Roberts stated that "[t]he panel's approach . . . leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'" *Id.* As noted above, then-Judge Roberts stated that *en banc* review was appropriate because the panel decision and the court's earlier decision in *NAHB* "conflicts" with the Fifth Circuit decision in *GDF Realty Investors, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003), discussed below. *Id.*

4. *GDF Realty Investments, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003)

The Fifth Circuit held that the ESA is constitutional as applied to the taking of cave species. The court rejected the rationale of the District of Columbia Circuit in *Rancho Viejo*, stating that the ESA regulates the taking of the species rather than the actor's commercial development. 326 F.3d at 634-637. The court also concluded that the cave species, unlike the wolves in *Gibbs*, "are neither economic nor commercial," because "[t]here is no market for them." *Id.* at 638. The court concluded, nonetheless, that regulation of the cave species is "part of a larger regulation of activity," and the ESA's protection of endangered species is "economic in nature" because of "the 'incalculable' value of the genetic heritage that might be lost absent regulation." *Id* at 640. The taking of the species, the court stated, threatens the "interdependent web" of all species, because "the extinction of any species risks the extinction of all species and thus could lead to the extinction of ecosystems." *Id.* Thus, the court applied the aggregation principle to all species because they are part of an "interdependent web" of "ecosystems."

The court denied rehearing *en banc*, with six judges dissenting. 362 F.3d 286 (2004). The dissenting opinion, written by Judge Edith Jones, argued that the panel decision failed to apply the factors described in *Lopez* and *Morrison*, and that the taking of the cave species does not affect interstate commerce or involve economic activity. *Id.* at 288-292.

The dissenting opinion agreed that some endangered species takes may be aggregated, and regulated, as in the case of the red wolves in *Gibbs*, because these species have interstate commercial effects, such as by encouraging hunting, tourism and scientific research. *Id.* at 292. The dissenting opinion argued, however, that the panel decision's theory that all species can be regulated as part of an "interdependent web" is flawed, because this theory would allow Congress to regulate land uses traditionally regulated by the states, thus obliterating the line between what is national and what is local. *Id.* at 292-293. "The Commerce Clause," the dissenting opinion argued, "does not regulate crime, sexual inequality, or ecosystems as such – it regulates commerce." *Id.* at 294.

B. The Conflicts Among the Circuit Court Rationales

The rationales adopted by the circuit courts in the above cases are in conflict. The Fourth Circuit in *Gibbs* held that the ESA is constitutional as applied to species that have interstate commercial effects, such as by encouraging tourism, trade and research. 214 F.3d at 492. The Fifth Circuit in *GDF Realty* (as well as the two majority judges of the District of Columbia Circuit in *NAHB*) held that the ESA is constitutional in all circumstances because it preserves "biodiversity" and "ecosystems." *GDF Realty*, 326 F.3d at 640; *NAHB,* 130 F.3d at 1043-1057 (Wald, J.), 1057-1060 (Henderson, J.) The District of Columbia Circuit in *Rancho Viejo* held that the ESA is

constitutional as applied to actors engaged in commercial activity, regardless of whether the species has commercial effects. 323 F.3d at 1073. In short, the Fourth Circuit focused on the *regulated* species, the Fifth Circuit (and the *NAHB* majority) on *all* species, and the District of Columbia Circuit (in *Rancho Viejo* but not *NAHB*) on the *actor*.

The Fourth Circuit's theory in *Gibbs* – which focuses on the regulated species – suggests that the ESA is *not* constitutional as applied to species that do *not* have interstate commercial effects. This theory conflicts with the Fifth Circuit's theory in *GDF Realty* that the ESA is constitutional in *all* circumstances because it preserves the "independent web" of "ecosystems." Similarly, the Fifth Circuit in *GDF Realty* flatly rejected the theory of the District of Columbia Circuit in *Rancho Viejo* that the constitutional issue turns on whether the *actor* is engaged in commercial activity, rather than whether the *species* affects interstate commerce. *GDF Realty*, 326 F.3d at 634-637. Obviously the outcome of a particular case may be different depending on which, if any, of these theories applies. A constitutional focus on the *regulated* species may lead to a different outcome than a focus on *all* species, just as a constitutional focus on the *actor* may lead to a different outcome than a focus on the *species*.

Not surprisingly, the circuit courts also disagreed on whether and how to apply the *Wickard* aggregation principle, which is the linchpin of Congress' power to regulate purely intrastate activities. *Gibbs*

held that aggregation applies to individual wolves if the regulated community of wolves has interstate commercial effects. 214 F.3d at 493. *GDF Realty*, on the other hand, held that aggregation applies to all species because all species are part of an "interdependent web" of "ecosystems." 326 F.3d at 640. Thus, *Gibbs* applied aggregation to the *regulated* species and *GDF Realty* to *all* species.

The Eleventh Circuit in the instant case adopted the "biodiversity" and "ecosystems" theory applied by the Fifth Circuit in *GDF Realty* and the two majority judges of the District of Columbia Circuit in *NAHB*. Pet. App. A42-A43, A45-A46.[4] The Eleventh Circuit decision conflicts with the Fifth Circuit decision in *Gibbs* – which focused on the commercial effects of the regulated species – and with the District of Columbia Circuit decision in *Rancho Viejo*, which focused on the commercial activities of the actor. The Eleventh Circuit aggregated all species, contrary to the *Gibbs* view that only the regulated species can be aggregated. While the *Gibbs* theory *limits* the ESA's constitutional reach, the Eleventh Circuit's theory *expands* the ESA's constitutional reach beyond any

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[4] On the other hand, one of the two majority judges in *NAHB* rejected the argument, accepted by the Eleventh Circuit here, Pet. App. A42, A44-A45, that endangered species will lead to medical discoveries, and stated that it is "impossible to ascertain" whether this will occur. *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring). Thus, a majority of the District of Columbia Circuit panel rejected the Eleventh Circuit's "medical discoveries" theory.

limits. This Court should grant review to resolve the conflict between the Eleventh Circuit decision and *Gibbs* and *Rancho Viejo*, as well as the conflict among the various decisions themselves.

In our view, the *Gibbs* theory is consistent with this Court's analyses in *Lopez*, *Morrison* and *Raich* and the theories adopted by the other circuit courts – including the Eleventh Circuit here – are not. The *Gibbs* theory focuses on the commercial effects of the regulated species – rather than the commercial effects of *all* species or the actor's development project – and allows aggregation of individual species members if the larger regulated species has interstate commercial effects. As the dissenting opinion in *GDF Realty* argued, the *Gibbs* theory is consistent with the principles established in *Lopez* and *Morrison* because it ensures that the link between congressional regulation and interstate commerce is substantial and not attenuated; the *Gibbs* theory establishes a logical stopping point to the congressional commerce power, and limits Congress' power to intrude into areas traditionally regulated by the states. *GDF Realty*, *rehearing en banc denied*, 362 F.3d at 288-294 (Jones, J., dissenting). The proper inquiry in this case is whether the Alabama sturgeon has interstate commercial effects, not whether the sturgeon is part of the world's ecological system, which it undeniably is. This Court should review and reverse the Eleventh Circuit decision not only because it fails to properly apply Commerce Clause principles, but also to resolve

the intercircuit conflict regarding the proper constitutional rationale.

III. THE APPLICATION OF THE ENDANGERED SPECIES ACT TO INTRASTATE, NON-COMMERCIAL SPECIES HAS OBSTRUCTED, AND IS OBSTRUCTING, WATER DEVELOPMENT THAT IS NECESSARY FOR THE ECONOMIC GROWTH OF THE WESTERN STATES.

The question presented here is vitally important in California and other western states, which, because of their arid or semi-arid conditions, depend on water development for their economic growth, but where a high percentage of the nation's listed endangered species is found.[5] Some federal courts, applying the ESA, have required federal and state water projects in the western states to substantially reduce water supplies to urban and agricultural users in order to benefit intrastate, non-commercial endangered species. Thus, the question raised here significantly affects the economy of the western region, by affecting the water supplies necessary for its development.

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[5] According to the U.S. Fish and Wildlife Service website, California has 309 listed endangered species, which, except for Hawaii, is more than triple the number of listed endangered species in any other state. *See* http://ecos.fws.gov/tess_public/StateListing.do?state=all.

In California, for example, the federal Central Valley Project (CVP) and California's State Water Project (SWP) are the primary sources of the state's developed water supplies. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-736 (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-283 (1957); *United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 82, 97-111 (1986). The CVP and SWP provide drinking water to millions of residents and irrigation water to the agricultural industry, the nation's largest. The projects store water in upstream dams and reservoirs; the waters, when released, flow downstream to the Delta where the Sacramento and San Joaquin Rivers meet; and the projects then distribute the water from the Delta – the hub of California's water network – to urban and agricultural users located elsewhere. A federal district court in California recently held that a biological opinion for the CVP issued by the U.S. Fish and Wildlife Service violated the ESA because the opinion failed to adequately protect the Delta smelt, a tiny fish found in the Delta that has no commercial value or effects. *Natural Resources Defense Council, et al. v. Kempthorne*, 2007 U.S. Dist. LEXIS 42263 (E.D. Cal., May 25, 2007). The district court subsequently ordered the CVP and SWP, which are operated coordinately, to substantially reduce their water deliveries from the Delta to urban and agricultural users in order to

benefit the smelt.[6] The district court order will, according to California Department of Water Resources officials, likely cause the projects to reduce their water supplies to urban residents and farmers by about one-third, which, according to California Governor Arnold Schwarzenegger, will cause "a devastating blow to our water system and state economy." "Smelt Ruling May Cut Into Water Supply," Los Angeles Times, p. B1 (Sept. 1, 2007). *Id.* In effect, the application of the ESA to a single intrastate, non-commercial species will cause California to lose one-third of its water supplies, which will likely trigger the devastating economic effects predicted by California's governor.

In New Mexico, the federal government operates several major water projects in the Rio Grande – principally the Middle Rio Grande Project and San Juan Chama Project – that deliver water to cities, including the City of Albuquerque, and farming districts in New Mexico. The Tenth Circuit, in a 2-1 panel decision, recently held that a biological opinion for the projects issued by the U.S. Fish and Wildlife Service violated the ESA because it failed to adequately protect the silvery minnow, a listed

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[6] The district court orally announced its order at a hearing on August 31, 2007, and stated that it intends to issue a written order later. *See* Hearing re Interim Remedies Ruling, Reporter's Partial Transcript of Proceedings, *Natural Resources Defense Council v. Kempthorne*, No. 05-CV-1207-OWW (E.D. Cal., Aug. 31, 2007).

endangered species found only in New Mexico that has no commercial value. *Silvery Minnow v. Keyes*, 333 F.3d 1109 (10th Cir. 2003), *partially vacated as moot*, 355 F.3d 1215 (2004). The Tenth Circuit, affirming the district court decision, ordered the projects to substantially reduce water deliveries to the cities and farming districts in order to benefit the silvery minnow. Although Congress subsequently overturned a portion of the decision,[7] the decision effectively reallocated a substantial portion of New Mexico's water supply for the benefit of an intrastate species that has no interstate commercial effects.

As these cases demonstrate, the question presented here has significant economic consequences in the western states, which depend on water development for their economic sustenance, and these consequences may be felt in the national economy to the extent it is formed by the western states' economy. The question presented here has far-reaching economic significance beyond its importance as a matter of constitutional law.

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[7] Congress overturned the Tenth Circuit decision as applied to the San Juan Chama Project but not the Middle Rio Grande Project. Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, § 208(a), 117 Stat. 1827 (Dec. 1, 2003).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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